Supreme Court, U.S.
FILED
931067 JAN 3 1994

No. 93-___

In The

Supreme Court of the United States

October Term, 1993

TV NEWS CLIPS OF ATLANTA, INC., CAROLYN JANNETTE DUNCAN AND JEFFREY DUNCAN,

Petitioners,

vs.

GEORGIA TELEVISION COMPANY, d/b/a WSB-TV,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

LYMAN RAY PATTERSON
School of Law
University of Georgia
Athens, Georgia 30602
(706) 542-5145

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does 17 U.S.C. § 502(a), which authorizes injunctions only "to prevent or restrain infringement of a copyright," empower a federal court to enjoin permanently the copying of all portions of a television broadcaster's future news programming when the effect of the injunction is to protect uncopyrightable materials contained in works yet to be created contrary to the Copyright Act, the Copyright Clause of the United States Constitution, and this Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 111 S.Ct. 1282 (1991)?

2. Does 17 U.S.C. § 107, the fair use doctrine, codified in conformity with the free speech values contained in the Copyright Clause and the right of access under the First Amendment of the United States Constitution, empower a federal court to deny any right of fair access to news reports and to negate the fair use doctrine completely because the use is commercial even though it is non-competitive?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding. Petitioner TV News Clips of Atlanta, Inc. is a small, closely held corporation with neither parent nor subsidiary.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION 1

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THIS COURT HAS NOT SETTLED, BUT NOW SHOULD SETTLE, THE QUESTION WHETHER THE COPYRIGHT ACT EMPOWERS COURTS TO USE PERMANENT INJUNCTIONS TO GRANT COPYRIGHT PROTECTION THAT THE CONSTITUTION PRECLUDES CONGRESS FROM GRANTING 9

A. The Question is Important for the Proper Administration of the Copyright Act 9

B. The Source of Judicial Authority to Grant Copyright Injunctions is the Copyright Statute 12

C. The Injunction Granted Provides More Copyright Protection than the Constitution Allows or the Copyright Act Permits 13

1. Uncopyrightable materials are not entitled to copyright protection 14

TABLE OF CONTENTS – Continued

Page

2. Authors are not entitled to copyright protection for material they have not created 14

3. Whether works not yet created will fulfill the originality requirement cannot be known 15

4. Works that a copyright holder customarily destroys should be deemed to be abandoned and, in any event, should not be given copyright protection by injunction 16

D. This Court Should Settle the Question Now 17

II. THIS COURT HAS NOT SETTLED, BUT NOW SHOULD SETTLE, THE QUESTION WHETHER NEWS REPORTS ARE SUBJECT TO A RIGHT OF FAIR ACCESS AS AN ASPECT OF THE FAIR USE DOCTRINE BY REASON OF THE FREE SPEECH VALUES IN THE COPYRIGHT CLAUSE AND THE FIRST AMENDMENT RIGHT OF ACCESS 19

A. This Court Should Recognize the Right of Fair Access to News Reports as a Fundamental Right, Especially by the Subjects of the News Reports. 19

B. The Commercial Use Presumption Should not be Used to Deny the Right of Fair Access Under the Fair Use Doctrine Especially if the Use is Non-Competitive 22

C. The Public Interest Justifies a Broad Right of Fair Access to Copyrighted News-of-the-Day Reports Under the Fair Use Doctrine 23

TABLE OF CONTENTS – Continued

Page

1. Copyrights are not fungible and fair access to, and the fair use of, ephemeral news-of-the-day reports has little economic impact on the copyright holder 24

2. Fair access is consistent with both the nature and the purpose of copyright as a limited statutory monopoly to benefit the public interest 25

3. Fair access is an aspect of the media's duty to inform the public 26

D. This Court Should Settle the Question Now 27

CONCLUSION 28

APPENDICES

APPENDIX A: Opinion of the Court of Appeals.... 1a

APPENDIX B: District Court Order Granting Preliminary Injunction..... 3a

APPENDIX C: District Court Order Granting Summary Judgment and Permanent Injunction..... 35a

APPENDIX D: Final Judgment of District Court... 49a

APPENDIX E: Denial of Petition for Rehearing and Suggestion of Rehearing En Banc... 51a

APPENDIX F: Pertinent Constitutional and Statutory Provisions..... 53a

TABLE OF AUTHORITIES

Page

CASES

Baker v. Selden, 101 U.S. 99 (1879) 10

Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) 18

Board of Education v. Pico, 457 U.S. 853 (1982) 11, 13

Campbell v. Acuff-Rose Music, Inc., U.S.S.Ct. No. 92-1292 22

Clayton v. Stone, 5 Fed. Cases 999 (No. 2,872) (C.C.S.D.N.Y. 1829) 24

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1974) 27

Dowling v. United States, 473 U.S. 207 (1985) 25

Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 111 S. Ct. 1282 (1991) ..... *passim*

Fortnightly Corp. v. United Artist, 392 U.S. 390 (1968) 25

Fox Film Corp. v. Doyal, 286 U.S. 123 (1931) 25

Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) 22, 27

Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) 11, 17, 24, 26, 27

Stevens v. Gladding, 17 How. 447 (1854) 12

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) 25, 26

United States v. Paramount Pictures, 334 U.S. 131 (1948) 25

Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834) 11, 12, 18

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Art. I, § 8, cl. 8 .....8, 9, 14, 16

U.S. Constitution, Amend. I. 8, 27

STATUTES

15 U.S.C. § 1121 2

17 U.S.C. § 101 .....10, 11, 14

17 U.S.C. § 102 .....3, 9, 11, 20

17 U.S.C. § 103 .....3, 9, 15

17 U.S.C. § 105 .....3, 14

17 U.S.C. § 107 .....3, 20

17 U.S.C. § 201(b) 3, 14

17 U.S.C. § 301(a)(b) 3, 11, 12

17 U.S.C. § 302(c) 3, 9

17 U.S.C. § 502(a) 3

28 U.S.C. § 1291 2

28 U.S.C. § 1331 2

28 U.S.C. § 1338 2

TREATY

Berne Convention, Paris Text – July 24, 1971, Art. 2(8) 24

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. (1976) . . 20, 21

MISCELLANEOUS

Joyce, Craig, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshal Court Ascendancy*, 83 Mich. L. Rev. 1291 (1985) 11

Joyce, Craig, *Wheaton v. Peters: The Untold Story of the Early Reporters*, 1985 Sup. Ct. Hist. Soc. Y. B. 34 11

Patterson, L. Ray & Lindberg, Stanley W., *The Nature of Copyright: A Law of Users' Rights* (1991) 13, 18

Patterson, Lyman Ray, *Copyright in Historical Perspective* (1968) 21

Patterson, L. Ray, "Free Speech, Copyright, and Fair Use," 40 Vand. L. Rev. 1 (1987) 21

Patterson, L. Ray, "Understanding Fair Use," 55 J. of Law & Contemp. Prob. 249 (1992) 19

Patterson, L. Ray, "Copyright and the 'exclusive Right' of Authors," 1 J. Intell. Prop. Law 1 (1993) 20

Solberg, Thorvald, *Copyright in Congress, 1789-1904* (C.O. Bull. No. 8) 1904 24

No. 93-___

In The

Supreme Court of the United States

October Term, 1993

TV NEWS CLIPS OF ATLANTA, INC., CAROLYN JANNETTE DUNCAN AND JEFFREY DUNCAN,

Petitioners,

vs.

GEORGIA TELEVISION COMPANY, d/b/a WSB-TV,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners TV News Clips of Atlanta, Inc., Carolyn Duncan and Jeffrey Duncan respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") entered in the above-entitled case on January 8, 1993.

OPINIONS BELOW

The Opinion of the Court of Appeals rendered January 8, 1993, is unreported and is printed in the Appendix

hereto ("App.") at 1a. The Opinion of the United States District Court for the Northern District of Georgia ("District Court") granting a preliminary injunction is reported at 718 F. Supp. 939 (1989) and is reprinted here. App. 3a; the opinion of the District Court granting Plaintiff/Respondent Georgia Television summary judgment and a permanent injunction is unreported and is printed at App. 35a. The Final Judgment of the district court is printed at App. 49a.

JURISDICTION

Respondent Georgia Television Company, d/b/a WSB-TV filed a complaint for copyright infringement, trademark infringement, unfair competition, deceptive trade practices under Georgia law, and common law unfair competition and misappropriation in the United States District Court for the Northern District of Georgia on September 30, 1988. Jurisdiction was based on 28 U.S.C. §§ 1331, 1338 and 15 U.S.C. § 1121. The district court granted a preliminary injunction to Respondent on its copyright infringement claim on January 9, 1989, App. 3a, and on May 29, 1991 granted respondent summary judgment and a permanent injunction. App. 35a. On September 23, 1991, the district court entered final judgment for respondent. App. 49a.

Petitioner filed timely notices of appeal from the preliminary injunction (No. 91-8589), basing jurisdiction in the Court of Appeals on 28 U.S.C. § 1292(a), and from the final judgment (No. 92-8331), basing jurisdiction in the Court of Appeals on 28 U.S.C. § 1291. The two

appeals were consolidated. Judgment of the Court of Appeals was entered on January 8, 1993. App. 1a. A Petition for Rehearing with a Suggestion for Rehearing En Banc was timely filed on January 25, 1993. The Petition for Rehearing was denied by order dated November 3, 1993 and is printed herein. App. 51a. This Petition has been filed within ninety days of that date and is therefore timely.

The jurisdiction of this Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, § 8, cl. 8 and Amendment I of the United States Constitution and several provisions of the Copyright Revision Act of 1976 (the "1976 Act"), each of which is printed in App. 53a. The pertinent provisions of the 1976 Act are 17 U.S.C. §§ 102, 103, 105, 107, 201(b), 301(a)(b), 302(c), and 502(a).

STATEMENT OF THE CASE

This is an action for alleged infringement of statutory copyright by a television station, WSB-TV of Atlanta, against a television news monitor, TV News Clips of Atlanta, Inc.

A television news monitor provides for subjects of news stories broadcast on television the same type service that a newspaper clipping service provides to subjects of news stories printed in newspapers. The difference is that television newscasts are performed (not

published in copies) and access to them is limited by both time and geographical constraints; newspapers are published and copies are available in fixed form at a later date. While a newspaper clipping service is a convenience providing subsequent access to published newspapers, a television news monitoring service is a necessity for subsequent access to televised news reports, which may be – and usually are – otherwise unavailable.

Representative clients of TV News Clips "include RJR Nabisco, Internal Revenue Service, IBM, Georgia Power, AT&T, Georgia Republican Party, and Georgia Democratic Party," App. 6a, and Mayor Andrew Young of the City of Atlanta, the client whose need for videoclips of news reports led to this action.

The circumstances giving rise to this infringement suit began when the National Democratic Party decided to hold its convention to nominate candidates for President and Vice-President of the United States in Atlanta, Georgia, in the summer of 1988. Mayor Young, presumably aware of the importance of the convention to the city and the enormous impact of television coverage in presenting the city to the nation and the world, had his office contact and request TV News Clips to provide the Mayor during the week of the convention videoclips of news stories presented on local television stations (including reports from television networks broadcast on local affiliate stations) as well as Cable News Network, which is headquartered in Atlanta.

The videoclips were to be provided daily to enable the Mayor to prepare for his daily news conferences. App. 6a.

WSB-TV refused as a matter of policy to market videoclips of news stories to anyone, App. 7a, 8a, which policy would include the Mayor of Atlanta, even to assist him in the performance of official duties. Moreover, in view of the number of television stations in Atlanta and the number of daily newscasts, the cost, both in terms of equipment and the time of staff members (who did not necessarily have the required expertise), made it impractical for the Mayor's Office to do in a professional manner what TV News Clips was equipped to do. TV News Clips monitored the Atlanta stations and put the relevant daily news stories from the different stations onto one videotape for the Mayor, making it unnecessary for him to view separate videotapes of the various newscasts.

Of all the stations whose newscasts were monitored, none made any objection, save WSB-TV, who filed this lawsuit seeking to put TV News Clips out of business.

This case began when Mayor Young, appearing on a WSB-TV noon day show shortly after the 1988 Convention, complimented TV News Clips for its excellent service in providing the material that enabled him to prepare for his news conferences. Apparently, this was the opportunity for which WSB-TV had been waiting. WSB-TV had "served on defendants advance notice of potential infringement on at least a monthly basis since December 11, 1986, pursuant to 17 U.S.C. § 411(b)," App. 10a n.2, that is, for almost two years, without having taken any further action until it decided to file this lawsuit.

WSB-TV explained that "it delayed filing the present action until 1988 to obtain what it believed to be litigable

proof of such activity in late July 1988," App. 11a, although its own personnel had "utilized TV Newsclips services," App. 10a, and it would have been a simple matter for WSB-TV to have had someone order videotapes for it.

In addition to finding that the broadcast quality tape of news broadcasts "is kept approximately thirty days," App. 4a, the district court also found that: 1) Not all the material contained in WSB-TV newscasts is original and "may originate from other news sources," App. 9a (and thus is fixed before being broadcast by WSB-TV contrary to the requirements of 17 U.S.C. § 411(b)); 2) WSB-TV does not market videotapes of its news stories, App. 7a; 3) WSB-TV "provides the public with little access to its broadcasts," App. 8a; 4) "WSB-TV's arguments on the potential damages caused by defendants' activities are largely speculative," App. 10a; 5) "WSB-TV's own personnel have utilized TV Newsclips' services," *id.*; 6) and "TV News Clips is providing a useful service by providing entities and individuals directly affected by the subject matter of WSB-TV broadcasts [an opportunity] to become familiar with important public commentary affecting their interest." *Id.*

The court determined that "[t]he fact that WSB-TV's future broadcasts are not presently created does not preclude injunctive relief against defendants' videotaping these copyrighted broadcasts," App. 12a, although the court could not pre-determine the constitutional requirement of originality for the content of the broadcasts. Because TV News Clips is a commercial service, App. 19a, the district court determined as a matter of law that it was not entitled to the fair use defense, App. 16a, 41a,

and "that any defense based on the first amendment is inapplicable in the present action." App. 17a. The court, having found WSB-TV's success on the merits likely, issued a preliminary injunction.

On defendant's Motion for Reconsideration in light of this Court's 9-0 decision in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 111 S. Ct. 1282 (1991), the district court concluded that *Feist* is a fact-bound decision related only to "the white pages of a phone book" the facts of which "are dramatically distinguishable from the facts in the instant case" and denied the motion. App. 47a.

On motion for summary judgment by both parties, relying in part on "the 'unabashedly commercial' nature of defendants' activities," App. 40a, the court granted summary judgment for WSB-TV. The court awarded WSB-TV statutory damages of $108,000, App. 46a, and attorneys' fees, App. 47a (later determined to be in the amount of $140,995.10) and provided copyright protection for all of WSB-TV's news programming – without regard to statutory requirements – by granting the following permanent injunction:

> TV News Clips, Carol Duncan, and all persons acting in concert with them, or either of them, are hereby permanently RESTRAINED and ENJOINED from copying or selling copies of WSB-TV's broadcast news, public affairs and other locally produced programs, in whole or in part.

App. 44a-45a.

Appeals having been taken from both the preliminary injunction and the final order, the appeals were consolidated on motion of TV News Clips, defendant and petitioner. Argument in the cases was heard January 5, 1993; the Court of Appeals affirmed the district court's orders in a one sentence *per curiam* opinion on January 8, 1993. App. 1a.

REASONS FOR GRANTING THE WRIT

The paradox of this case is that in issuing and affirming an overly broad injunction, the lower courts assumed an equitable power that Congress had not granted; and in not implementing the fair use doctrine for electronic newscasts, they failed to use the equitable power that Congress had granted. The result is an injunction imposing a prior restraint under the guise of protecting future copyrights and thereby negating the free speech values in the Copyright Clause, U.S. Const., Art. I, § 8, cl.8, and the free speech right of access guaranteed by the First Amendment. U.S. Const. Amend. 1.

The decision below thus erodes – and is legal precedent for destroying – the public domain for all literature, informational as well as imaginative. If allowed to stand, it portends a copyright-bound society in which access to learning materials will require a constant stream of coins in the copyright turnstile.

I. THIS COURT HAS NOT SETTLED, BUT NOW SHOULD SETTLE, THE QUESTION WHETHER THE COPYRIGHT ACT EMPOWERS COURTS TO USE PERMANENT INJUNCTIONS TO GRANT COPYRIGHT PROTECTION THAT THE CONSTITUTION PRECLUDES CONGRESS FROM GRANTING.

A. The Question is Important for the Proper Administration of the Copyright Act.

Rarely has one case presented issues so fundamental to the administration of copyright law as this one, involving as it does the power of federal courts to use permanent injunctions to provide copyright protection for: 1) uncopyrightable material; 2) material to which the claimant concededly has no copyright; 3) works customarily destroyed by erasure shortly after use; and 4) future works, the originality of which cannot be known. Copyright protection for materials in any of these categories would be contrary to the Copyright Clause, the copyright statute, and decisions of this Court. The injunction granted in this case protects material in all four categories.

The Copyright Clause empowers only Congress to grant copyright, only for the writings of an author, and only for limited times. U.S.Const. Art. I, § 8, cl. 8.

The Copyright Act provides copyright only for "original works of authorship fixed in a tangible medium of expression," 17 U.S.C. § 102(a), only for a limited term, 17 U.S.C. § 302(c), and specifically denies copyright for the unoriginal components of copyrighted works. 17 U.S.C. § 103(b).

This Court has held that: copyright protects the expression of ideas, but cannot protect ideas themselves, *Baker v. Selden*, 101 U.S. 99 (1879) (codified as 17 U.S.C. 102(b)); sweat-of-the-brow copyrights, not being based on originality, are unconstitutional, *Feist Publications, Inc. v. Rural Telephone Co., Inc.*, 499 U.S. 340, 111 S. Ct. 1282 *passim* (1991) (*Feist*); and there is a constitutional right to use uncopyrightable materials in compilations, *id.* at 1290, of which television newscasts, compilations of news stories, are examples.

To deny access to the expression of ideas is to protect the ideas; and the sweat-of-the-brow doctrine is the only basis for a copyright injunction protecting future works. The result is a judicial copyright without regard for either the requirement of originality or the constitutionally limited term of copyright.

The Court of Appeals thus sanctioned the departure of the district court so far from the accepted and usual course of proceedings as to call for an exercise of this Court's supervision.

The judicial copyright can most accurately be characterized as a federal common law copyright because it incorporates the defining features of the state common law copyright: perpetual protection for unpublished works as a plenary property right secured by a court rather than Congress.[1]

---

[1] Electronic newscasts are not published, they are performed. 17 U.S.C. § 101 (definitions of "publication" and "to perform" publicly). In the 1976 Act, Congress abolished the state common law copyright for works fixed in a tangible

This Court emphatically rejected the federal common law copyright in its first copyright case, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), and has never retreated from that position.[2] The aberrant federal common law copyright in this case explains why. It gives the electronic media unparalleled power to deny public access to news-of-the-day reports presented over the public airwaves. Despite the First Amendment right of access, *Board of Education v. Pico*, 457 U.S. 853 (1982), all television stations, all television networks and all cable networks now have a federal common law copyright as legal precedent to enable them to maintain absolute control of access to every news report they *will disseminate* publicly, but briefly, and only within a rigid time framework.

It is not surprising, then, that the judicially created federal common law copyright – which redefines the scope of copyright – violates the most fundamental principle of American copyright law: Under the Constitution "it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors *in order to give the public appropriate access to their work product.*" *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)(emphasis added).

---

medium of expression. 17 U.S.C. §§ 102(a), 301(b)(1). Otherwise, it continues to exist, for whatever value unfixed works have.

[2] See Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshal Court Ascendancy*, 83 Mich. L.Rev. 1291 (1985), and Joyce, *Wheaton v. Peters: The Untold Story of the Early Reporters*, 1985 Sup. Ct. Hist. Soc. Y. B. 34.

For no type of work is the public's appropriate access more important than for television news reports, probably the single most important force in shaping public opinion today.

B. The Source of Judicial Authority to Grant Copyright Injunctions is the Copyright Statute.

Because the Constitution gives Congress the task of "defining the scope" of copyright, the source of a U.S. court's authority to grant copyright injunctions is the copyright statute. The condition for the exercise of this authority is the copyright claimant's compliance with the terms and conditions of the statute, as this Court ruled in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 665 (1834) (all conditions important and the law requires them to be performed). Copyright holders thus are limited to remedies provided by the statute. *See Stevens v. Gladding*, 17 How. 447, 454 (1854) (court required statutory authority to grant copyright injunction and could not impose forfeiture in copyright infringement case without statutory authority); 17 U.S.C. § 301 (all legal or equitable rights of copyright "governed exclusively by this title").

Copyright injunctions thus must comport with the terms of the copyright statute. Therefore, a court can grant such injunctions only in the exercise of its statutory authority, not as a matter of equity in the exercise of its inherent power. This explains why apparently there is no instance of a U.S. court granting a copyright injunction until after Congress in 1819 amended the copyright statute authorizing such injunctions. 3 Stat. 481-82, 15th Cong., 2nd Sess., c. 19. Congress has continued the

injunctive power in each successive revision of the statute (1831, 1870, 1909 and 1976), but has given no indication that a court's authority to grant such injunction may exceed the rights granted in the statute itself.

This case demonstrates why this is so. A federal court's use of its injunctive power to create a federal common law copyright has resulted in a violation of policies mandated by both the Copyright Clause and by the First Amendment. The Copyright Clause requires that: copyright be used to promote, not to inhibit, learning; copyright not be used to destroy the public domain; and copyright benefit the author.[3] The First Amendment precludes a prior restraint of the right of access because, as this Court has held, the rights to see and hear are as important elements of free speech as the rights to print and speak. *Board of Education v. Pico*, 457 U.S. 853 (1982).

C. The Injunction Granted Provides More Copyright Protection than the Constitution Allows or the Copyright Act Permits.

By ignoring (or misreading) provisions of the Copyright Act, the lower courts granted and affirmed an injunction that provides copyright protection far in excess of what Congress can grant in the exercise of its legislative power.

---

[3] *See* L. Patterson & S. Lindberg, *The Nature of Copyright: A Law of Users' Rights*, Ch. 4 "Copyright in the U.S. Constitution: Policies," 47-55 (1991).

1. Uncopyrightable materials are not entitled to copyright protection.

It is obvious that uncopyrightable materials are not copyrightable. Except that the district court and the Court of Appeals assumed otherwise, mention of the point would be unnecessary, and the discussion can be brief. A Department of Defense film of troop action in the Gulf War, for example, cannot be protected by copyright, even if shown on a local television newscast. It is a work of the United States Government, and as such *it is not subject to copyright*, 17 U.S.C. §§ 105, 101 (definition of works of U.S. Government), regardless of who uses it and even if it is used for profit.

2. Authors are not entitled to copyright protection for material they have not created.

The fundamental condition for copyright is the creation of an original work of authorship. U.S. Const., Art. I, § 8, cl. 8; 17 U.S.C. § 102(a); *Feist*, 111 S.Ct. *passim*. In this case, WSB-TV is the author of works-made-for-hire, 17 U.S.C. § 201(b), which are compilations of news stories. Although WSB-TV conceded that its newscasts contain preexisting material that it does not create, the injunction provides the television station with copyright protection for that material, a result characteristic of the federal common law copyright. That copyright does not require courts to distinguish between the work of the compilation author (the newscast) and any preexisting material (those news stories created by others) that the compilation author uses.

The Copyright Act, however, requires that such a distinction be made. It specifically provides that the compilation copyright (the only type of copyright WSB-TV registered and thus claimed for its newscasts) "is independent of . . . any copyright protection in the preexisting material." 17 U.S.C. § 103(b). Thus the courts' plenary common law copyright gives WSB-TV protection for material it did not create, contrary to the Copyright Act and in usurpation of Congress' power under the Copyright Clause.

3. Whether works not yet created will fulfill the originality requirement cannot be known.

The original content of future electronic newscasts cannot be known, another truism that the lower courts ignored, despite this Court's ruling that originality is a constitutional requirement for copyright. *Feist*, 111 S. Ct. 1282, *passim*. The courts must not have realized the import of their actions, for their rejection of *Feist* resulted in copyright protection for the entire contents of future newscasts. The import is that this judicially created common law copyright denies the public a right to use a news monitor to obtain copies of public domain material in a copyrighted compilation. Yet, the use of such material is the essence of copyright and "a constitutional requirement." *Feist*, 111 S. Ct. at 1290.

The "constitutional requirement" exists because the public domain is a major free speech value in the Copyright Clause; it is ensured by the limited times provision and the requirement of an original writing. U.S. Const.

Art. I, § 8, cl. 8; *Feist*, 111 S. Ct., *passim*. Without the public domain, most, if not all, materials would be copyright bound to the detriment of the promotion of learning. Although it was presumably an unwitting creation, the federal common law copyright is an unlawful means to bring about this unconstitutional result: it is an unwarranted intrusion into the public domain protected by the Copyright Clause that disrupts (and could eventually destroy) the free market of ideas, as this case demonstrates.

4. Works that a copyright holder customarily destroys should be deemed to be abandoned and, in any event, should not be given copyright protection by injunction.

There are at least three reasons why WSB-TV's custom of erasing the videotapes of its newscasts on a regular 30-day-cycle should be deemed to be an abandonment of copyright, or, in any event, the forfeiture of the right to copyright protection for future works by injunction.

First, the Constitution limits copyright to writings, U.S. Const., Art. I, § 8, cl. 8, and accordingly Congress has limited copyright "to original works of authorship *fixed in any tangible medium of expression.*" 17 U.S.C. § 102(a) (emphasis added). An erased work satisfies neither the fundamental constitutional nor statutory requirement for copyright.

Second, thirty-day works never published and destroyed after they have been performed defeat the limited times provision of the Copyright Clause by reason of which copyrighted works are intended to go into

the public domain. *Sony Corporation v. Universal City Studios, Inc.* 464 U.S. 417, 429 (1984) (one purpose of limited term is to allow the public uncontrolled access after the copyright has expired).

Third, an author who rejects the terms of the copyright bargain by making a practice of abandoning works has no need for, and should not be entitled to, copyright protection. That author has substituted self-help for statutory rights and chosen not to comply with the terms and conditions of the copyright statute.

The unlawful aspects of the Court of Appeals' decision – copyright protection for uncopyrightable material; for the works of authors other than the copyright claimant; for uncreated works; and for works shortly to be erased – highlight the important question that this case presents: Can a court use its judicial power to create an anomalous federal common law copyright to grant copyright protection that the Constitution prevents Congress from granting with its legislative power?

D. The Court Should Settle the Question Now.

This case is so egregious in its faults and so outrageous in its consequences that one point seems clear. The issue is not whether the Court will answer the questions raised by the federal common law copyright, but when. Being the product of judicial disregard of copyright principles and policies, that copyright will emerge whenever

the policies and principles are ignored.[4] *See Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1542 (S.D.N.Y. 1991) (injunction to prevent future anthologizing of material for college courses applied to "works not currently existing but which may in the future be owned by plaintiffs").

As *Basic Books* indicates, lower courts seem not to understand that this Court in *Feist* reshaped the landscape of copyright law to reconform copyright to the limited grant of a statutory monopoly in accord with *Wheaton v. Peters*, 33 U.S. 591. *Feist* does implicitly what *Wheaton* did explicitly: It rejects the federal common law copyright *in toto*.

Until this Court acts to make *Feist's* rulings clear, apparently the federal common law copyright will continue to exist and thrive. Common law copyright for uncopyrightable material by a one-time registration of a single work is too good a deal to reject. The continuation of the federal common law copyright thus means an exponential expansion of the copyright monopoly far in excess of what Congress granted in the Copyright Act or the Constitutional Convention permitted in the Copyright Clause.

---

[4] *See* L. Patterson and S. Lindberg, *The Nature of Copyright*, Ch. 4, "Copyright in the U.S. Constitution: Policies," and Ch. 5, "Copyright in the Nineteenth Century: Principles and Rules" (1991).

II. THIS COURT HAS NOT SETTLED, BUT NOW SHOULD SETTLE, THE QUESTION WHETHER NEWS REPORTS ARE SUBJECT TO A RIGHT OF FAIR ACCESS AS AN ASPECT OF THE FAIR USE DOCTRINE BY REASON OF THE FREE SPEECH VALUES IN THE COPYRIGHT CLAUSE AND THE FIRST AMENDMENT RIGHT OF ACCESS.

A federal common law copyright protecting future works is a classic example of prior restraint. Whether the restraint applies to news-of-the-day reports over the public airwaves by a federal licensee or published books to be used in the classroom, it presents a chilling prospect for the promotion of learning. The threat is particularly ominous as to television newscasts, probably the single most potent force shaping public opinion in the United States today. The danger suggests that something has gone awry in copyright law, especially the right of fair access and the fair use doctrine.[5]

A. This Court Should Recognize the Right of Fair Access to News Reports as a Fundamental Right, Especially by the Subjects of the News Reports.

The Copyright Clause contemplates the right of access to copyrighted materials. Thus, it seems clear that in 1789, the exclusive Right of authors was only the right

---

[5] *See* Patterson, "Understanding Fair Use," 55 J. of Law & Contemp. Prob. 249 (1992).

to publish and vend, consistent with the policy of promoting learning.[6] However, the growth of the copyright monopoly (by reason of new communication technology) threatened this constitutionally required access to copyrighted materials. For example, the 1976 Copyright Act eliminated the traditional requirement of publication as a condition for copyright (which ensured public access). *Cf.* 17 U.S.C. § 10 (1909 Act) with 17 U.S.C. § 102(a) (1976 Act).

Consequently, Congress sought to ensure the continued right of access – and implemented the free speech values of the Copyright Clause – by codifying the fair use doctrine, 17 U.S.C. § 107, as an "equitable rule of reason." H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 65 (1976). Yet, the injunction in this case negates any right of access independently of the copyright holder's wishes. It precludes *any* copying of *any* portion of *any* newscast of WSB-TV. The station itself, however, will not provide a copy of a news story to anyone, even the person who is the subject of the story.

The injunction's operation as a prior restraint – and its most unfair aspect – is manifested in its empowerment of the television station to prevent a person's obtaining from an independent source a copy of a news report that the station has broadcast and that contains unfair, inaccurate, or derogatory information about that person. This is contrary to the intent of Congress as expressed in the House Report's fair use commentary on the bill that became the 1976 Copyright Act:

---

[6] *See* Patterson, "Copyright and 'the exclusive Right' of Authors," 1 *J. Intell. Prop. Law* 1 (1993).

> When a copyrighted work contains unfair, inaccurate, or derogatory information concerning an individual or institution, the individual or institution may copy and reproduce such parts of the work as are necessary to permit understandable comment on the statements made in the work.

H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. 73 (1976).

Understandably, a television station will not be eager to provide a videoclip to one who has been the subject of its report containing "unfair, inaccurate, or derogatory information," and the victim may be prevented by geographical or time constraints from making a copy. Therefore, the victim of a zealous television reporter's erroneous story should not be also the victim of a prior restraint and should be able to rely on and use an independent source to obtain a copy of the story. A television news monitor is the only such independent source.

The federal common law copyright in this case makes copyright a proprietary device of private censorship, in the manner of early copyright in Elizabethan and Jacobean England.[7] Congress codified the fair use doctrine to protect against this type of recidivistic copyright protection.[8]

---

[7] *See* L. Patterson, *Copyright in Historical Perspective*, Ch. 6, "Copyright and Censorship," 114-42 (1968).

[8] *See* Patterson, "Free Speech, Copyright, and Fair Use," 40 Vand. L. Rev. 1, 2-3 (1987).

B. The Commercial Use Presumption Should not be Used to Deny the Right of Fair Access Under the Fair Use Doctrine Especially if the Use is Non-Competitive.

While this Court has said that a commercial use is presumptively unfair, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), it has not said that the presumption is conclusive. The question here is whether a non-competitive use of news-of-the-day reports to provide fair access should be presumptively a fair use.[9]

If the commercial-use presumption is not conclusive, it is rebutted by the application of the four factors of § 107 to television newscasts. This is because under the first factor, the purpose of the use is to provide the subjects of news stories copies of the stories; under the second factor, the nature of the work is television newscasts devoted to informing the public of the news of the day. Together these two factors negate the commercial-use presumption against fair use because they implement core values of the First Amendment necessary to protect the marketplace of ideas in a free society.

As to the third factor, the amount used, the amount a news monitor uses is determined by the subjects of the news stories, who request a videoclip of the news report

---

[9] The commercial-use presumption question may well be controlled by this Court's decision in *Campbell v. Acuff-Rose Music, Inc.* U.S.S.Ct. No. 92-1292. If so, the Court should grant the writ, vacate the judgment, and remand in light of that case and *Feist Publications, Inc. v. Rural Telephone Co.*, 499 U.S. 340, 111 S. Ct. 1282 (1991).

so that they may see and hear what the newscaster has said about them. Whether that news story occupies one minute or twenty minutes of a thirty minute newscast the use is fair because it is in direct proportion to the use the newscaster has made of the subject who seeks the video-clip.

As to the fourth factor, economic impact, the news monitor's use had no economic impact on the copyright holder. The use was not a competitive use because WSB-TV – by its own admission – refuses voluntarily to sell a videotape of a news story to anyone for any purpose, although it does so under subpoena.

C. The Public Interest Justifies a Broad Right of Fair Access to Copyrighted News-of-the-Day Reports Under the Fair Use Doctrine.

The public interest protected by the free speech values in the Copyright Clause – the promotion of learning, the limited times, the requirement of original writings – suggests a fair use doctrine for news-of-the-day reports broader than for other type works. Such an approach is both appropriate and necessary to ensure fair access to the news. There are three especially persuasive reasons: 1) copyrights are not fungible and because news-of-the-day reports are *sui generis*, the fair access to, and fair use of, them has little, if any, economic impact on the copyright claimant; 2) fair access to news-of-the-day reports is consistent with both the nature and purpose of copyright; and 3) fair access to news reports is an aspect of the media's duty to keep the public informed.

1. Copyrights are not fungible and fair access to, and the fair use of, ephemeral news-of-the-day reports has little economic impact on the copyright holder.

Contrary to the Court of Appeals' treatment of the copyright for television newscasts, not "all copyrights are fungible. . . . Copying a news broadcast may have a stronger claim to fair use than copying a motion picture." *Sony Corporation of America v. Universal City Studios*, 464 U.S. 417, 455 n. 40 (1984). Thus in terms of public interest, news-of-the-day reports have little in common with copyrighted entertainment motion pictures.

Indeed, copyright has traditionally treated news-of-the-day as being *sui generis* subject to a broad right of fair access and fair use, if entitled to copyright at all. An early nineteenth century case, for example, held that newspapers were not entitled to copyright protection, *Clayton v. Stone*, 5 Fed. Cases 999 (No. 2,872) (C.C.S.D.N.Y.1829) (opinion by Justice Thompson on circuit), and during the same century Congress refused to pass bills providing such protection. *See* T. Solberg, *Copyright in Congress 1789-1904* (C.O. Bull. No. 8) 48-49 (1905). Nevertheless, newspapers prospered.

Today, the Berne Convention, of which the United States is now a member, provides: "The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information." Berne Convention, Paris Text – July 24, 1971, Art. 2(8).

As these precedents imply, fair access to news-of-the-day reports has little, if any, economic impact on the news

media. The unchallenged operation of newspaper clipping services and the two-year delay in filing this lawsuit suggests the lack of economic harm. WSB-TV's custom of destroying the videotapes of its newscasts on a 30-day cycle proves it.

2. Fair access is consistent with both the nature and the purpose of copyright as a limited statutory monopoly to benefit the public interest.

Copyright is the grant of a limited statutory monopoly, not a plenary property right. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154 (1975) (The Copyright Act "gives to a copyright holder a monopoly limited to specified 'exclusive rights' in his copyrighted works."); *Fortnightly Corp. v. United Artist*, 392 U.S. 390, 393 (1968) ("Copyright Act does not give a copyright holder control over all uses of his copyrighted work."); *Dowling v. United States*, 473 U.S. 207, 216-17 (1985) ("A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protection. . . . ").

The reason that copyright is a limited statutory monopoly is that it is primarily to benefit the public interest, as this Court has consistently held. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1931) ("[T]he primary object in conferring the monopoly lies in the general benefits derived by the public from the labors of authors."); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes

reward to the owner a secondary consideration."); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."); *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 419 (1984) ("[T]he limited grant [of the monopoly privilege of copyright] is a means by which an important public purpose may be achieved."); *Feist*, 111 S.Ct. 1282, 1290 (1991) ("The primary objective of copyright is not to reward the labor of authors, but " '[t]o promote the Progress of Science and useful Arts.' ").

Therefore, fair access to news reports is consistent with both the nature and purpose of copyright.

3. Fair access is an aspect of the media's duty to inform the public.

The media have a duty to keep the public informed. This Court used this fact to the benefit of WSB-TV (the very station that brought this action to put a news monitor out of business) when it sought the protection of the First Amendment for its absolute discretion to publish any information (even in violation of a state statute).

As this Court said, an individual has but limited time and resources to observe the operations of government and "relies necessarily upon the press to bring to him [or her] in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government," for "[w]ithout the information provided by the press most of us and many of our representatives

would be unable to vote intelligently . . . " *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1974). The Court thus recognized that the media are entitled to the protection of the First Amendment in fulfillment of their duty to keep the public informed. *Id.*

Implicit in the First Amendment's protection of the media's duty to inform is the public's right of access to what the media report. Copyright holders, however, as this Court has noted, *Sony Corp. of America*, 464 U.S. 417, 432 n. 13 (1984), tend to claim rights in excess of the law and thus to use copyright to inhibit the public's right of access.

Copyright is intended to promote, not to obstruct, the dissemination of ideas and information. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 579 (1985) (copyright intended to nurture broad dissemination of ideas and information) (dissenting opinion). Therefore, it would be appropriate for this Court to encourage the media to implement their duty to promote learning by upholding the public's right of fair access to news reports. This the Court can easily do by recognizing fair access as part of the fair use doctrine required by the free speech values of the Copyright Clause, the First Amendment, and Section 107 of the Copyright Act.

D. This Court Should Settle the Question Now.

Given the influence that television newscasts exert on public opinion in general, and the harm that erroneous reporting can do to an individual in particular, this Court should make the right available without further delay.

This case, however, extends beyond television newscasts. Legal precedent for one type of copyrighted work serves as precedent for other type works. This case is thus symptomatic of a swift-moving tide toward a copyright-bound society that threatens the very purpose of copyright, the promotion of learning. This Court should stop it before it becomes a tidal wave inundating free speech rights protected by the Copyright Clause and guaranteed by the First Amendment, and only this Court can.

CONCLUSION

For each and all of the foregoing reasons, a writ of certiorari should issue to review the judgment of the Eleventh Circuit.

Respectfully submitted,

Lyman Ray Patterson

APPENDIX A
OPINION OF THE COURT OF APPEALS

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 91-8589, 92-8331

D. C. Docket No. 1:88-cv-2207-JTC

GEORGIA TELEVISION COMPANY,
d/b/a WSB-TV,

Plaintiff-Appellee,

versus

TV NEWS CLIPS OF ATLANTA, INC.,
CAROLYN JANNETTE DUNCAN,

Defendants-Appellants,

JEFFREY DUNCAN,

Defendant.

Appeals from the United States District Court
for the Northern District of Georgia

(Filed January 8, 1993)

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge,
and JOHNSON, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. *See Pacific and Southern Company, Inc., d/b/a WXIA-TV v. Duncan, d/b/a TV News Clips*, 744 F.2d 1490 (11th Cir. 1984); *Pacific and Southern Company, Inc., d/b/a WXIA-TV v. Duncan, d/b/a TV News Clips*, 792 F.2d 1013 (11th Cir. 1986).

APPENDIX B

DISTRICT COURT ORDER GRANTING PRELIMINARY INJUNCTION

GEORGIA TELEVISION COMPANY,
d/b/a WSB-TV, Plaintiff,

v.

TV NEWS CLIPS OF ATLANTA, INC.,
Carolyn Duncan, Jeffery Duncan,
Defendants.
Civ. A. No. 88-CV-2207-JTC.
United States District Court,
N.D. Georgia,
Atlanta Division.
Jan. 9, 1989.
Order of Court July 13, 1989.
718 F. Supp. 939; 1989 WL 8179

ORDER OF COURT AND PRELIMINARY INJUNCTION

CAMP, District Judge.

This matter is before the court on plaintiff's motion for a preliminary injunction and plaintiff's motion to expedite consideration of its motion for preliminary injunction. The court heard evidence on these matters on November 2, and 3, 1988. For the following reasons, the above motions are GRANTED.

I. FINDINGS OF FACT

Plaintiff Georgia Television Co. d/b/a WSB-TV (hereinafter "WSB-TV") operates a television station in Atlanta, Georgia, pursuant to a license granted by the Federal Communications Commission. WSB-TV transmits across Channel 2.

WSB-TV creates and broadcasts several daily news programs, weekly public affairs, and other locally produced programs (hereinafter "broadcast news programs"). WSB-TV's daily news programs consist mainly of pre-recorded news stories produced inside and outside of WSB-TV's studios that are linked together by live commentary from the station's anchor persons. WSB-TV also creates and broadcasts several weekly public affairs programs, news specials, and documentaries. A notice of copyright appears at the end of each newscast. The programs display WSB-TV's federal registered service marks "WSB-TV" and "Action News" to identify WSB-TV as the source of the broadcast. These broadcasts represent the creative expression of news events and not the underlying factual basis of such news events.

WSB-TV makes three separate types of records of its broadcast. A non-broadcast quality audio and/or visual library copy of all broadcasts is kept approximately three years. This copy is simultaneously recorded twenty-four hours a day at the time of transmission. A professional quality tape may be made of news broadcasts. This record is kept approximately thirty days. Also, copies of specific stories are made that are then used for later excerpting by WSB-TV for later broadcasts. These stories may or may not have aired. These tapes may be held for an extended period of time before broadcast.

Defendant TV News Clips of Atlanta, Inc. (hereinafter "TV News Clips") is a commercial enterprise that videotapes television news programs, a practice known as news monitoring, and edits these news videotapes for its customers, a process known as news clipping. TV News Clips does not seek the permission of WSB-TV or

any other broadcaster before selling the tapes, nor does it place a notice of copyright on these tapes. Defendant does place a label on each tape, which states: "For personal use only and not for rebroadcast." Ms. Carol Duncan is the President, Director, and registered agent of TV News Clips. Defendant Jeffery Duncan is Secretary of TV News Clips.

Since the Fall of 1980 defendants, or their predecessors in interest, have operated TV News Clips. The business was originally a one-person operation run out of Ms. Duncan's home. The business has now expanded into a full-fledged commercial operation run out of an office. Besides Ms. Duncan, TV News Clips employs three employees, two full-time and one part-time. Five videotaping machines operate on a regular basis. Defendants receive approximately 100 requests per month for videotaping services. In 1987, TV News Clips grossed $150,000.00.

In the past, defendants, or their predecessors in interest, directly solicited business by identifying persons and organizations and attempting to sell them relevant news clips. Now, however, direct solicitation of customers accounts for only 2% of TV News Clips' business. Ms. Duncan testified that most customers directly contact TV News Clips, with no solicitation by the Company.[1]

---

[1] Ms. Duncan offered the following examples as pertinent: Mark Hyman, a WSB-TV news reporter, referred a local policeman to TV News Clips to obtain a copy of news broadcasts in which he appeared. Ms. Duncan also testified that Susan Hooper, a former producer of WSB-TV's 11:00 P.M. news broadcast referred clients to TV News Clips. Ms. Hooper also directly

Referrals from advertising agencies or other entities generate a portion of defendants' business. TV News Clips also advertises in the Yellow Pages and is listed in advertising agency brochures. Two years ago, defendant did a direct mailing to current clients, advertising agents, and major corporations, which explained the monitoring service.

TV News Clips' representative clients include RJR Nabisco, Internal Revenue Service, IBM, Georgia Power, AT & T, Georgia Republican Party, and Georgia Democratic Party. TV News Clips provided Atlanta Mayor, Andrew Young, the tapes at issue in this case. These tapes were daily newsclips of the Democratic National Convention, which aided the Mayor in his daily preparation for news conferences. For these services, Mayor Young praised TV News Clips' services.

Charges for defendants' news monitoring and clipping services are based on the time expended researching and producing newsclips for customers who require specific monitoring services. In some cases, TV News Clips submits a fixed bid, such as the news monitoring services performed for Mayor Young. In a more typical arrangement, TV News Clips is compensated per clip based on zero to ten minutes for which customers pay $65.00 for an initial newsclip purchase. Each additional clip on the same cassette would be $30.00. Additional charges are

---

purchased a newscast tape from defendants for her resume file. Ms. Duncan further testified that David Lippoff, News Director of WSB-TV, called her to obtain a copy of a newsclip that had been accidentally erased. Lippoff, however, disputes such a claim.

involved when customers request TV News Clips to obtain newsclips in other markets from other monitors.

One of defendants' arguments is that defendants simply acted as the agents of certain individuals in taping programs for the individual's personal use. The argument is that if an individual is expressly authorized to tape television broadcasts for personal use pursuant to Sony Corp. v. Universal City Studios, 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984), then the individual's agent or employee can also videotape the program for that individual's personal use. The court finds as a matter of fact, however, that defendants acted neither as the agent nor as the employee of the individuals and entities to whom it sold tapes. The contractual arrangement between defendants and its customers indicates defendant acts as an independent contractor, selling a product as well as a service.

WSB-TV does not currently market videotaped copies of its broadcasts or news stories. WSB-TV allows the public limited access to its broadcast videotapes. However, the court finds that such access is on a case-by-case basis, and at the discretion of WSB-TV management. Normally, a person affected by a news story may view WSB-TV's copy and audiotape the program. Under special circumstances depending entirely on WSB-TV's discretion, videotapes may be provided. Of course, WSB-TV does respond to lawful subpoenas for videotapes.

Andrew Fisher, WSB-TV's Station Manager, testified that all requests for copies of its broadcasts are referred to himself or David Lippoff, the News Director. These callers are told that although WSB-TV does not sell copies of

its broadcasts, WSB-TV honors requests to view tapes at the station and, on occasion, has arranged for viewings outside the station. Fisher testified that WSB-TV allows a person viewing a tape to make an audio recording of the tape, to take still or motion photographs of the tape, and will provide, at the station's expense, a transcript of the broadcast. Fisher also testified that WSB-TV regularly lends copies of certain broadcasts to educational institutions. In addition, the station provides videotaped copies of its broadcasts in response to any lawful subpoena.

Phoebe Holybee, a lieutenant with the Georgia Tech police, testified that WSB-TV interviewed her on August 24, 1988. Subsequent to this interview, Holybee called WSB-TV on September 1, 1988, to inquire about purchasing a copy of her taped interview. Holybee was told that WSB-TV did not provide transcripts, and no further information was available. Ms. Holybee's testimony supports the finding that WSB-TV provides the public with little access to its broadcasts.

WSB-TV strongly opposes defendants' marketing of videotapes of WSB-TV broadcasts or news stories. WSB-TV offers the following examples as evidence of damage caused by defendants' activities. First, such marketing would enable competitors to use portions of WSB-TV programs without consent. Thus, WSB-TV's competitive advantage, created by its resources and labor, would be lost. WSB-TV, however, cited no example of a competitor's use of any portion of a broadcast taped by defendants. Second, defendants' sales of WSB-TV newscasts may deprive WSB-TV of a substantial tax benefit it claimed for donations of portions of its film library to the University of Georgia.

Third, copies of the newsclips made by defendants may be misused. For example, political candidates or corporations may use portions of defendants' newsclips to misrepresent WSB-TV's position or to suggest favoritism or an endorsement. WSB-TV offers only one example of such an incident which occurred in the early 1980's in a local election campaign.

A separate reason WSB-TV gives as evidence of potential damages caused by defendants' activities is that video segments in a particular broadcast may originate from other news sources; music synchronized to images may be owned by composers; film footage may be borrowed from the network; and commercials may be owned by sponsors. While WSB-TV has obtained a license to use these materials, WSB-TV is not licensed to allow copying and reselling of this matter. WSB-TV alleges that defendants' use of these materials may subject it to a charge of copyright infringement. WSB-TV, however, was unable to show complaint against it.

WSB-TV also alleges that defendants' newsclipping services will decrease advertising viewership and thus reduce WSB-TV's advertising revenues. WSB-TV's advertising revenues depend to a great extent on its on-air viewership. WSB-TV sells adds [sic] based on the number of viewers who watch the station. Defendant's newsclips delete advertisements. Therefore, defendants' newsclipping services increase public access to WSB-TV's broadcasts, but WSB-TV is not able to count such viewership in setting its commercial advertising rates.

Finally, WSB-TV's [sic] maintains that defendants' newsclipping services could jeopardize its ability to sell

its distribution rights on its broadcasts. Andrew Fisher, WSB-TV's station manager, testified that defendants' activities may impair WSB-TV's ability to market broadcasts, such as "The Boy King." WSB-TV recently sold the distribution rights to this program, which dramatically reenacted the boyhood of Martin Luther King. The revenue that had been anticipated from the sale of these rights was critical to the decision to produce the program. However, Mr. Fisher did not testify to any example of any portion of the news broadcasts at issue here which WSB-TV has ever attempted to distribute.

WSB-TV's arguments on the potential for damages caused by defendants' activities are largely speculative. Defendants claim that any damages to WSB-TV caused by their newsclipping are outweighed by the social utility of their services. The court does find that TV News Clips is providing a useful service by providing entities and individuals directly affected by the subject matter of WSB-TV broadcasts to become more familiar with important public commentary affecting their interests. The useful nature of defendants' business is somewhat supported by the fact that WSB-TV's own personnel have utilized TV Newsclips [sic] services. See supra note 1.

The instant litigation arose from WSB-TV's discovery that in mid and late July 1988, despite having received an advance notice of infringement from plaintiff on June 29, 1988,[2] defendants copied and sold to the City of Atlanta portions of twenty-seven different WSB-TV broadcast

---

[2] WSB-TV has served on defendants advance notices of potential infringement on at least a monthly basis since December 11, 1986, pursuant to 17 U.S.C. § 411(b).

news programs. Although WSB-TV suspected copyright infringement when it first began sending the advance notices of infringement, it delayed in filing the present action until 1988 to obtain what it believed to be litigable proof of such activity in late July 1988.

After effecting the copyright registration which is a prerequisite to bringing a copyright infringement action, WSB-TV filed the present action. WSB-TV seeks a preliminary injunction to enjoin the infringement of its copyright pursuant to 17 U.S.C. § 502(a), 15 U.S.C. § 1116, and Fed.R.Civ.P. 65(a) WSB-TV also seeks impoundment of all copies of its broadcast news programs in defendants' possession or control pursuant to 17 U.S.C. § 503(a).

II. CONCLUSIONS OF LAW

A. Copyright law requires this Court to issue a preliminary injunction.

Plaintiff WSB-TV seeks a preliminary injunction pursuant to 17 U.S.C. § 502(a), which authorizes a federal court to "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."[3] Preliminary injunctions are a common judicial response to the imminent infringement

---

[3] WSB-TV has also prayed for injunctive relief pursuant to its non-copyright claims including those for trademark infringement, unfair competition, and violation of Georgia's Prohibition of Deceptive Trade Practices. Nevertheless, in copyright cases, a plaintiff seeking preliminary injunctive relief must demonstrate the requirements under 17 U.S.C. § 502(a). Accordingly, the court will initially consider injunctive relief pursuant to 17 U.S.C. § 502(a).

of an apparently valid copyright. Dallas Cowboy Cheerleaders v. Scoreboard Posters, 600 F.2d 1184 (5th Cir.1979). Such an injunction may issue for the copying of WSB-TV's broadcasts, which are not the subject of the present litigation. The fact that WSB-TV's future news broadcasts are not presently created does not preclude injunctive relief against defendants' videotaping these copyrighted broadcasts because 17 U.S.C. § 502(a) provides for injunctions to prevent infringement of a copyright and not necessarily the registered copyright that gives rise to the action. Pacific and Southern Company, Inc., d/b/a/ WXIA-TV v. Duncan, d/b/a/ TV News Clips, 744 F.2d 1490, 1499 n. 17 (11th Cir.1984), cert. denied, 471 U.S. 1004, 105 S.Ct. 1867, 85 L.Ed.2d 161 (1985) (hereinafter "WXIA I ").

A plaintiff seeking injunctive relief must demonstrate (1) that there is a substantial likelihood of plaintiff's success on the merits at trial; (2) that irreparable injury will be suffered unless the injunction issues; (3) that the threatened injury to the movant outweighs the damage which the injunction may cause the opponent; and (4) that the injunction would not be adverse to the public interest. See Dallas Cowboy Cheerleaders, 600 F.2d at 1187; Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F.Supp. 1031, 1033 (N.D.Ga.1986). The first factor, substantial likelihood of success is most important in determining whether an injunction should issue in a copyright action. Id.

1. There is a substantial likelihood that WSB-TV will succeed on the merits at trial.

If the plaintiff demonstrates a prima facie case for copyright infringement and the absence of any affirmative defenses, the plaintiff has shown a substantial likelihood of success on the merits and is usually entitled to a preliminary injunction to enjoin such infringement pursuant to 17 U.S.C. § 501(a). Original Appalachian Artworks, 642 F.Supp. at 1040. "If the record demonstrated a substantial likelihood that the [plaintiff] could have a valid copyright infringement claim against defendants, the district court was well within its discretion in granting the preliminary injunction." Dallas Cowboy Cheerleaders, 600 F.2d at 1188. See Wainwright Securities, Inc. v. Wall St. Transcript Corp., 558 F.2d 91 (2d Cir.1977), cert. denied, 434 U.S. 1014, 98 S.Ct. 730, 54 L.Ed.2d 759; Encyclopedia Britannica Educational Corp. v. Crooks, 447 F.Supp. 243 (D.C.N.Y. 1978).

WSB-TV has met the two requirements necessary to demonstrate a prima facie case of copyright infringement which require the plaintiff to show (1) ownership of a valid, existing copyright and (2) copying of the copyrighted material by the defendant. Original Appalachian Artworks, 642 F.Supp. at 1033. WSB-TV has satisfied this two-part requirement.

In order to determine whether WSB-TV owns a valid, existing copyright in its news programs, the first question is whether broadcast television news programs constitute original works susceptible to copyright under 17 U.S.C. § 102(a). WSB-TV has shown that its broadcasts represent

creative product and involve editorial discretion. Copyright protection does not extend to news "events" or the facts or ideas which are the subject of the news reports. Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1368 (5th Cir. 1981); Wainwright Securities, Inc., 558 F.2d at 95; WXIA I, 572 F.Supp. at 1192. However, news reports, as distinguished from their factual basis, involve editorial discretion and creativity and thus are subject to copyright protection. International News Service v. Associated Press, 248 U.S. 215, 234, 39 S.Ct. 68, 70, 63 L.Ed. 211 (1918); Wainwright, 558 F.2d at 95; Pacific and Southern Company, Inc., d/b/a/ WXIA-TV v. Duncan, d/b/a/ TV News Clips, 572 F.Supp. 1186, 1192 (N.D.Ga.1983). "[A] very slight degree of original contribution to form will suffice" to differentiate an original work subject to copyright protection from a simple restatement of fact not subject to copyright protection. 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 2.11[B] (1988). Such protection extends to electronic news reports as well as written reports. See 17 U.S.C. § 102(a)(5), (6), and (7).

Pursuant to 17 U.S.C. § 102 and § 411(b), copyright protection subsists in these programs once they become "fixed" in a tangible medium. In other words, copyright protection attaches to the broadcast feature only when the first copy of the transmission is made. See e.g., WXIA I, 744 F.2d at 1494; 17 U.S.C. § 101 (definition of "fixed").

It is undisputed that WSB-TV has properly claimed and perfected its copyrights in its broadcasts. WSB-TV simultaneously records its broadcasts at the time of transmission. WSB-TV has informed the public of its copyright claims in its programs through broadcast of its notices of copyright at the conclusion of each program and has

informed defendants in particular through service of advance notices of potential infringement. Moreover, WSB-TV has filed with the Copyright Office formal applications for registration of its copyrights in the twenty-seven programs at issue in this case, and one program has received registration on an expedited basis. "[C]ertificates of registration . . . 'constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate,' 17 U.S.C. § 410(c), including the requirements of originality and susceptibility to copyright under 17 U.S.C. § 102(a)." Donald Frederick Evans and Associates, Inc. v. Continental Homes, Inc., 785 F.2d 897, 903 (11th Cir.1986). WSB-TV has a statutory right to institute an infringement action for both the program that received registration on an expedited basis and as-yet unregistered programs pursuant to 17 U.S.C. § 411(b). In conclusion, WSB-TV has made the required showing of ownership of a valid, existing copyright in its news broadcasts.

The second factor necessary to demonstrate a prima facie in a copyright infringement action is the copying of the copyrighted material. Original Appalachian Artworks, 642 F.Supp. at 1033. Defendants concede that they copied and sold copies of portions of the twenty-seven WSB-TV broadcasts at issue in this case. Defendants intend to continue to copy and sell plaintiff's future newscasts.

In addition to the above analysis, the paramount factor in determining the likelihood of success is that defendants have previously litigated their activities in this Court. Atlanta station WXIA filed suit against defendant Duncan and the predecessor of defendant TV Newsclips in this Court, alleging that their activities

constituted unlawful copyright infringement.[4] See Pacific and Southern Company, Inc., d/b/a/ WXIA-TV v. Duncan, d/b/a/ TV News Clips, 572 F.Supp. 1186 (N.D.Ga.1983), aff'd in part and rev'd in part, 744 F.2d 1490, 1493 (11th Cir.1984), cert. denied, 471 U.S. 1004, 105 S.Ct. 1867, 85 L.Ed.2d 161 (1985). The Circuit Court of appeals affirmed the District Court's entry of judgment for WXIA, concluding that defendants' activities violated the copyright laws and that defendants "fair use" and first amendment defenses were without merit. See WXIA 1, 744 F.2d at 1494-99. The Circuit Court of Appeals, however, reversed as an abuse of discretion the District Court's refusal to enter a permanent injunction, holding that the plaintiff in that action was entitled to an injunction preventing further copying of future news broadcasts by defendants as a matter of right. See WXIA I, 744 F.2d at 1499-1500. On April 1, 1985, the Supreme Court denied defendants' Petition for Certiorari. See 471 U.S. at 1004, 105 S.Ct. at 1867, 85 L.Ed.2d 161 (1985).

This previous litigation demonstrates that WSB-TV has a substantial likelihood of success on the merits in the present case because few factual distinctions exist between the WXIA I case and the instant litigation. In WXIA I, the television station did provide greater public access to its broadcasts. WXIA did not market video tape

---

[4] The suit was filed against "Carol Duncan d.b.a. TV News Clips." As this Court recognized, defendant TV News Clips of Atlanta, Inc. is the corporate successor in interest to defendant Duncan's sole proprietorship, TV News Clips. Pacific and Southern, Inc. v. Duncan, 618 F.Supp. 469, 471 N.2 (N.D.GA, 1985). Defendant Jeffery Duncan was not named in this suit.

copies; however, it always honored requests to view tapes and usually allowed persons to buy specific tapes. WSB-TV allows less access to tapes than WXIA; however, WSB does allow some access to the broadcasts, as well as audiotaping by members of the public affected by the broadcast. Defendants only increase access to the public in a very limited way. In view of the reasoning and the broad holding of the Eleventh Circuit in the WXIA litigation, these factors are not sufficient to differentiate WSB's situation from WXIA's.

In summary, plaintiff has clearly demonstrated a prima facie case for copyright infringement. Furthermore, WSB-TV has demonstrated a substantial likelihood of success because defendants lack any substantial affirmative defense. See Metro Goldwyn-Mayer v. Showcase Atlanta Coop. Productions, 479 F.Supp. 351, 355 (N.D.Ga.1979) ("On motion for a preliminary injunction, plaintiffs must demonstrate a likelihood of success on the merits at trial as to asserted defenses, as well as to the element of plaintiffs' prima facie case").

In WXIA I, the Eleventh Circuit rejected defendants' "fair use" defense pursuant to 17 U.S.C. § 107 on facts similar to those in the instant case.[5] WXIA I also establishes that any defense based on the first amendment is inapplicable in the present action. See Wainwright Securities, 558 F.2d at 95 (generally, "[c]onflicts between interests protected by the first amendment and copyright laws

---

[5] Defendants concede that the "fair use" defense is inapplicable in the present action.

thus far have been resolved by application of the fair use doctrine").

Defendants' claim that current copyright protection for news reporting will be abolished by the United States' implementation of the Berne Convention is also without merit. The implementation of the Berne Convention will not occur until Spring 1989 and will not have a retroactive effect on U.S. copyright law. See the Berne Convention Implementation Act of 1988, Section 13(a), 17 U.S.C. § 101 note (1988). Notwithstanding the implementation date of the Berne Convention, it will not abolish copyright protection for news reports. In Article 2(a), the Berne Convention states that copyright protection will not extend to " news of the day." The Convention gives no indication that this provision is not compatible with existing U.S. law, which extends copyright protection to the creative expression of facts in a news programs, and not the underlying factual basis of these news reports. International News Service, 248 U.S. at 215, 39 S.Ct. at 68; Wainwright, 558 F.2d at 95; WXIA I, 572 F.Supp. at 1192.

Next, defendants argue that their operation is consistent with the videotaping for personal use that the Supreme Court approved in Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984). Defendants contend that they are merely agents for individuals or corporations whose home videotaping for personal, non-commercial use was authorized by the Sony decision.

Based on an analysis of 17 U.S.C. §§ 106 and 107, the Sony decision does suggest that private, non-commercial videotaping in the home would not infringe copyright

law. The Sony court emphasizes that such non-infringing videotaping of news broadcasts must be for personal, non-commercial use:

> although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter.

Sony, 464 U.S. at 451, 104 S.Ct. at 793. See also WXIA I, 744 F.2d at 1496 (A commercial purpose makes copying of a copyrighted work onto a videotape cassette presumptively unfair). The Court finds that defendants' videotaping WSB-TV broadcasts is for a commercial purpose and that TV News Clips is a commercial operation. WXIA I, 744 F.2d at 1496. Defendants' actions cannot be held a non-infringing use based on Sony.

Finally, defendants also argue that the policy underlying the copyright laws supports a finding in their favor of non-infringement. Copyright protection is the grant of a monopoly privilege. Sony, 464 U.S. at 429, 104 S.Ct. at 782. Originally, this limited grant was intended to motivate the creative activity of authors and inventors and "to allow public access to products of their genius after the limited period of exclusive control had expired." Sony 464 U.S. at 429, 104 S.Ct. at 782; U.S.C.A. 1787, Const. Art. 1, Section 8. Defendants maintain that WSB-TV's monopoly on its broadcasts does not encourage creativity on the part of the creators of such broadcasts. Thus, defendants argue that WSB-TV has abused such a privilege through the limited and arbitrary access it allows the public to tapes of its broadcasts.

While this Court recognizes that defendants offer access to WSB-TV broadcasts that WSB-TV may not afford the public, this Court cannot rewrite the copyright laws. As the Supreme Court in Sony made clear, "Congress . . . has been assigned the task of defining the scope of the limited monopoly" available under copyright law. 464 U.S. at 429, 104 S.Ct. at 782. In the WXIA case, defendants argued that they come within certain statutory exceptions. See WXIA I, 744 F.2d at 1494, n. 6. As this argument tacitly recognized, the appropriate forum in which defendants should assert their present policy arguments is in the Congress. Precedent binding on this Court has interpreted copyright law contrary to defendants' position. On facts nearly identical to those in the present case, the Eleventh Circuit has found that defendants' videotaping and newsclipping services constitute copyright infringement. See WXIA I, 744 F.2d at 1490. This Court is constrained by such binding precedent. WSB-TV has demonstrated a prima facie case of copyright infringement and a substantial likelihood of success on the merits, especially in light of the previous WXIA I litigation.

2. This Court must find that WSB-TV will suffer irreparable injury unless the injunction issues.

Once a copyright holder has made out a prima facie case of copyright infringement, irreparable injury is presumed. Original Appalachian Artworks, 642 F.Supp. at 1040; Wainwright Securities, Inc. 558 F.2d at 94; O'Neill Developments, Inc. v. Galen Kilburn, Inc., 524 F.Supp. 710, 715 (N.D.Ga.1981); Metro Goldwyn Mayer, 479

F.Supp. at 362. In copyright infringement cases, the standard for preliminary injunction is less rigorous, and the copyright holder may be presumed to suffer irreparable harm when his right to exclusive use of copyright material is invaded. Encyclopedia Britannica Educational Corp. v. Crooks, 447 F.Supp. 243 (D.C.N.Y.1978). When the plaintiff demonstrates a substantial likelihood of success at trial by establishing a prima facie case of copyright infringement and the absence of any affirmative defenses, a significant showing of actual damages is not required because irreparable injury is presumed. Original Appalachian Artworks, 642 F.Supp. at 1040.

A showing of irreparable harm, however, may be necessary if the plaintiff has failed to establish a substantial likelihood of success because a plausible affirmative defense exists or the plaintiff has failed to establish a prima facie case of infringement due to the dissimilarity of the copyrighted work and the allegedly infringing work. See Dallas Cowboy Cheerleaders, 600 F.2d at 1184; Plains Cotton Cooperative Association v. Goodpasture Computer Service, Inc., 807 F.2d 1256 (5th Cir.1987); Apple Barrel Productions, Inc. v. R.D. Barrel, 730 F.2d 384 (5th Cir.1984); McGraw Hill v. Worth Publishers, Inc., 335 F.Supp. 415 (S.D.N.Y. 1971); Life Music, Inc. v. Wonderland Music Co., 241 F.Supp. 653 (S.D.N.Y. 1965). In the present case, however, the plaintiff has demonstrated a prima facie case of copyright infringement and the absence of any affirmative defenses; therefore, irreparable injury may be presumed.

As the Eleventh Circuit recognized in WXIA I, the District Court should presume irreparable injury especially when the alleged infringement is of a commercial

nature as in this case. See WXIA I, 744 F.2d at 1497 ("a commercial use naturally produces harmful effects"). The Supreme Court in Sony explained that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." Sony, 464 U.S. at 451, 104 S.Ct. at 793. "If the intended use of the copyrighted material is for commercial gain, the likelihood of future harm may be presumed." Id.

Defendants argue that irreparable harm should not be presumed in this case because plaintiff delayed two years in bringing this action; thus, the equitable defense of laches should be recognized. WSB-TV asserts several reasons for this delay. First, WSB-TV assumed that defendants would cease the infringing activity given the WXIA I litigation and WSB-TV's subsequent cease and desist letters. WSB-TV also delayed in bringing this litigation to obtain what it considered litigable proof.

Defendant's defense based on laches has been previously rejected by this court. Original Appalachian Artworks, 642 F.Supp. at 1040. See e.g., Forry, Inc. v. Neundorfer, Inc., 837 F.2d 259, 267 (6th Cir.1988) (two year delay in bringing infringement action did not rebut the presumption of irreparable harm). Moreover, defendants have produced no evidence that they were prejudiced by WSB-TV's alleged delay. Accordingly, laches is not an appropriate defense in this action.

3. This Court must find that the threatened injury to WSB-TV outweighs the damage that the injunction may cause defendants.

This Court is cognizant of the potential damage an injunction may cause defendants as Ms. Duncan has testified that the effect of this injunction would destroy TV News Clips' business. Copyright law, however, dictates that such injury merits little equitable consideration and is insufficient to outweigh the continued wrongful infringement of WSB-TV's asserted legal rights. See e.g., Original Appalachian Artworks, 642 F.Supp. at 1040. In proceeding on a motion for preliminary injunction in cases in which plaintiff made a prima facie showing of copyright infringement, a preliminary injunction should not be denied merely because of the devastating effect or potential destruction of the defendant's business. See Concrete Machinery Company v. Classic Lawn Ornaments, Inc., 843 F.2d 600-612 (1st Cir.1988) ("It would be incongruous to hold that the more an enterprise relies on copyright infringement for survival, the more likely it will be able to defeat the copyright owner's efforts to have that activity immediately halted.") (quoting Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1255 (3d Cir.1983), cert. dismissed, 464 U.S. 1033, 104 S.Ct. 690, 79 L.Ed.2d 158 (1984) ("If the preliminary injunction were to be denied because of the 'devastating effect' the injunction would have on the defendant's business: 'if that were the correct standard, then a knowing infringer would be permitted to construct its business around its infringement, a result we cannot condone;' Doll Craft Industries, Ltd. v. Well-Made Toy Manufacturing Company, 479 F.Supp. 1105, 1117 (E.D.N.Y.1978)").

Based on such authority, this Court is constrained to find that the balance of hardships weighs heavily in support of an injunction. See, e.g., Original Appalachian Artworks, 642 F.Supp. at 1040; O'Neill Developments, 524 F.Supp. at 715.

Pursuant to Fed.R.Civ.P. 65(c), this Court will require plaintiffs to post a security bond. Rule 65(c) requires the posting of security in the sum as the Court deems proper for the payment of costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Based on the evidence presented at the hearing, the Court finds the amount of $125,000.00 as appropriate security. This restraining order shall not issue until the appropriate bond has been posted.

4. This court finds that an injunction would not be adverse to the public interest.

The final prerequisite to preliminary injunction relief is to determine where the public interest lies. Once the plaintiff in a copyright infringement action has established a likelihood of success on the merits, there is seldom any question of whether the entry of an injunction will serve the public interest. "[I]t is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing misappropriate [sic] of the skills, creative energies, and resources which are invested in the protected work." Apple Computer, Inc., 714 F.2d at 1255. See,

e.g., Dallas Cowboy Cheerleaders, 600 F.2d at 1187; Original Appalachian Artworks, 642 F.Supp. at 1040-41; O'Neill Developments, 524 F.Supp. at 715.

On facts similar to those at issue in this case, the Eleventh Circuit in WXIA I found public interest to be served by upholding copyright protections, despite the fact that TV News Clips' services increased public access to the copyrighted work. WXIA I, 744 F.2d at 1499-1500. This court is constrained to follow such precedent.

B. Plaintiff is not entitled to impoundment.

Plaintiff asked this Court to impound copies of WSB-TV news programs in defendants' possession pursuant to 17 U.S.C. § 503(a). This section authorizes a federal court to order on reasonable terms, the impounding of all copies "claimed to have been made or used in violation of the copyright owner's exclusive rights," as well as duplicating equipment used in reproducing such copies, such as "all plates, molds, matrices, masters, tapes, film negatives, or other articles. . . . "

District courts have great discretion in ordering impoundment as the Copyright Act does not delineate the standards which govern the issuance of such orders. Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc., 508 F.Supp. 854, 861 (N.D.Ga.1981), rev'd on other grounds, 694 F.2d 674 (11th Cir.1983). Section 503(a) merely states "The court *may*

order the impounding. . . . "[6] (emphasis added). The Court declines to order impoundment and finds it an appropriate issue for the final adjudication on the merits.

III. CONCLUSION AND PRELIMINARY INJUNCTION

For the reasons stated above, the court GRANTS the plaintiff's motion for rexpedited consideration and motion for preliminary injunction effective immediately upon the posting of $125,000.00 security bond. Plaintiffs may satisfy this requirement by posting with the clerk of court a bond in a form approved by the clerk. Defendants and all others acting by or through or in concert with defendants, upon plaintiffs' posting of adequate security, are hereby RESTRAINED and ENJOINED during the pendency of this action from copying or selling copies of WSB-TV's broadcast news, public affairs or other locally produced programs, in whole or in part. The court, however, DENIES the plaintiff's motion for impoundment.

SO ORDERED.

ORDER OF COURT

Currently before the court is defendants' motion for reconsideration of this court's order and preliminary injunction of January 5, 1989; defendants' motion for a

---

[6] While some authority holds that a district court has no discretion to determine what to impound upon a showing of copyright infringement, such authority involves a final judgment, not the issuance of a preliminary injunction. Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir.1972), cert. denied, 409 U.S. 847, 93 S.Ct. 52, 34 L.Ed.2d 88

protective order; plaintiff's motion to compel; defendants' motion to file a supplemental brief; and plaintiff's motion for leave to file a supplement to the complaint. For the following reasons, defendants' motion for reconsideration is DENIED [# 32]; defendants' motion to extend discovery is GRANTED [# 39]; defendants' motion for a protective order [# 40] is GRANTED; plaintiff's motion to compel is GRANTED IN PART and DENIED IN PART [# 41]; defendants' motion to file a supplemental brief is GRANTED [# 52]; and plaintiff's motion for leave to file a supplement to the complaint is GRANTED [# 53].

I. Defendants' Motions for Reconsideration and Leave to File a Supplemental Brief

Defendants seek reconsideration of this court's order and preliminary injunction, entered on January 10, 1989, on the basis that plaintiff did not comply with the jurisdictional prerequisites for maintaining an infringement action. Defendants maintain that plaintiff did not seek registration in compliance with 17 U.S.C. § 411(b), a jurisdictional prerequisite to bringing this action.

Registration is a condition precedent to the filing of an infringement action. 17 U.S.C. § 411(a); Nimmer on Copyright, § 7.16[B][1]. Section 411 is therefore a jurisdictional statute. Section 17 U.S.C. § 411(b) provides an exception to the requirement of registration prior to the institution of an infringement action for works consisting of sounds, images, or both:

> In the case of a work consisting of sound, images, or both, the first fixation of which is

> made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement . . . if, in accordance with requirements that the Registrar of Copyrights shall prescribe by regulation, the copyright owner –
>
> (1) serves notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and
>
> (2) makes registration for the work, if required by subsection (a), within three months after its first transmission.

Thus, the copyright owner must serve timely notice upon the infringer before the first fixation of the work, and must identify the work, the time and source of its first transmission, and must declare an intent to secure copyright in the work. The copyright owner must also make registration for this work within three months of its first transmission.

Plaintiff introduced evidence both at the preliminary injunction hearing and attached to their Complaint that establishes they have complied with the jurisdictional prerequisites of § 411(b). On June 27, 1988, plaintiff WSB-TV served on defendants pursuant to 17 U.S.C. § 411(b), formal written notice identifying WSB-TV's broadcast news programs and declaring WSB-TV's intention to secure copyrights in these programs. All of the broadcasts upon which WSB-TV bases its copyright infringement claims are within the regularly scheduled news broadcasts delineated in the June 27, 1988, notice,

except for an unscheduled news presentation at 8:00 p.m. on July 17, 1988. The June 27, 1988, notice, however, is sufficient as to this broadcast because the notice specifies that it applies to unscheduled news presentations such as the 8:00 p.m. broadcast on July 17, 1988. The newscasts which are the subject of this copyright infringement were broadcast on July 13-22, 1988. Therefore, WSB-TV's June 27, 1988, notice was properly served upon defendant within the requirement of § 411(b) of not less than ten or more than thirty days before the transmission at issue. WSB-TV's also properly registered these works within three months after their first transmission on August 15, 1988, or August 23, 1988, and August 30, 1988. Accordingly, WSB-TV, has complied with the requirements of § 411(b).

Defendants argue that WSB-TV has not complied with § 411(b) because it did not decide to register the copyright claim until after the advance notice was sent. This argument is unpersuasive because the June 27, 1988, notice sent to defendants specifically states that WSB-TV intends to seek copyright registration. Defendants also argue that § 411(b) does not apply to WSB-TV's broadcasts at issue in this case because they contain prerecorded segments. See KCNC-TV, Inc. v. Broadcast Information Services, Inc., 9 U.S.P.Q.2d 1732(d), 717 F.Supp. 1449 (Colo.1988). In KCNC-TV, a defendant copied and sold the segment called "Wednesday's Child," a program segment that appeared in its newscast. The court reasoned that "Wednesday's Child" was pretaped and thus "KCNC could have registered its copyright for the pretaped segment before it transmitted the news broadcast in which it was included. . . . " 9 U.S.P.Q.2d at 1735,

717 F.Supp. at 1453. Explaining that the copyrighted work did not contain live lead-in, the court held that § 411(b) was inapplicable since the work was not simultaneously fixed and transmitted.

Even though portions of WSB-TV's broadcasts contain pretaped segments, WSB-TV is entitled to copyright protection for the live audiovisual works which, due to time constraints and the nature of the program, cannot possibly be registered prior to transmission, unlike the broadcasts in KCNC-TV. Reports of news stories, particularly stories breaking near broadcast time, cannot be registered in the copyright office prior to their transmission on a news program. WSB-TV's broadcasts, therefore, fall within the requirements of § 411(b) of a "work consisting of sound, images, or both, the first fixation of which is made simultaneously with its transmission. . . ." See Pacific and Southern Co., Inc., d/b/a WXIA-TV v. Duncan, d/b/a TV News Clips, 744 F.2d 1490, 1499 (11th Cir.1984), cert. denied, 471 U.S. 1004, 105 S.Ct. 1867, 85 L.Ed.2d 161 (1985).

In sum, WSB-TV properly complied with the requirements of § 411(b), a jurisdictional prerequisite, in order to maintain this action. Accordingly, the Court DENIES defendants' Motion for Reconsideration. The Court GRANTS the defendants' Motion to file a Supplemental Brief.

II. Plaintiff's Motion for Leave to File Supplemental Complaint

Pursuant to Fed.R.Civ.P. 15(d), plaintiff seeks leave to file a supplement to its complaint. The requested

supplementation is necessary to reflect the issuance by the United States Copyright Office of Certificates of Registration for the broadcast news programs identified in the Complaint in Counts 2 through 27. Those counts presently state that plaintiff made application for the Certificate of Registration but do not reflect that "since the Complaint was filed, the certificates have been issued." For good cause shown, the Court GRANTS plaintiff's Motion for Leave to File a Supplemental Complaint.

III. Defendants' Motion for a Protective Order

WSB-TV has requested TV News Clips to produce various documents pertaining to TV News Clips' clients and business, such as unpaid and paid invoices, telephone or desk logs and indices on monitoring logs describing the subject matter videotaped by TV News Clips. TV News Clips has agreed to produce the requested documents; however, it has requested that these documents be accorded "Confidential – Counsel Only" status. WSB-TV rejected this request and has agreed to give these documents temporary "Confidential – Counsel Only" status pending the Court's ruling on this motion for a protective order pursuant to Fed.R.Civ.P. 26(c)(7).

Under Rule 26(c)(7), restrictions on discovery material may be allowed for "good cause" when disclosure of a "trade secret or other confidential research, development or commercial information" is involved. "Good cause" in the context of Rule 26(c)(7) means that the party seeking the protective order must demonstrate (1) that

the material sought to be protected is confidential and (2) that disclosure will create a competitive disadvantage for the party. See 4 Moore's Federal Practice ¶ 26.75, at 26-484.

The Affidavit of Carol Duncan demonstrates that the information WSB-TV seeks is confidential and will create a competitive disadvantage for defendants. A protective order would protect defendant TV News Clips in this action. The Court finds the protective order proposed by defendant TV News Clips to be appropriate. Therefore, the Court will GRANT the defendants' Motion for a Protective Order pursuant to the terms of the protective order proposed by defendants.

IV. Plaintiff's Motion to Compel

Plaintiff WSB-TV seeks to compel defendants to comply with discovery request No. 8 of plaintiff's First Request for Production of Documents. WSB-TV seeks to compel production of defendants' tax returns and other personal financial data. Defendants object on the basis that information sought for periods prior to the infringements at issue is irrelevant to plaintiff's copyright infringement claims in this action.

The documents sought by plaintiff include records of television monitoring "profits, earnings or revenues [of defendants] during any time during the period of January, 1980 to the present, including, without limitation, statements of annual, quarterly, and monthly sales, federal and state income tax returns and state and local sales

and use tax returns." These documents reflect defendants' profits, earnings, and revenues from television monitoring activities.

This copyright infringement action concerns twenty-seven (27) works that were broadcast in the summer of 1988. Pursuant to Rule 26(b)(1), the information sought prior to January, 1987, is not relevant to plaintiff's damages, even if plaintiff elects statutory damages pursuant to 17 U.S.C. § 504(c). Accordingly, the court DENIES IN PART plaintiff's motion to compel for information sought prior to January, 1987. However, the court will GRANT IN PART plaintiff's motion to compel to the extent that it seeks information after January, 1987, not already produced by defendants.

Accordingly, the Court GRANTS IN PART and DENIES IN PART the plaintiff's Motion to Compel. The Court will extend discovery from sixty (60) days of the entry date of this Order to enable the parties to comply with the above rulings. Accordingly, the Court will GRANT defendants' Motion for an Extension of Discovery.

V. Conclusion

In sum, defendants' motion for reconsideration is DENIED [# 32]; defendants' motion to extend discovery is GRANTED [# 39]; defendants' motion for a protective order [# 40] is GRANTED; plaintiff's motion to compel is GRANTED IN PART and DENIED IN PART [# 41]; defendants' motion to file a supplemental brief is GRANTED

[# 52]; and plaintiff's motion for leave to file a supplement to the complaint is GRANTED [# 53].

SO ORDERED.

APPENDIX C

DISTRICT COURT ORDER GRANTING SUMMARY JUDGMENT AND PERMANENT INJUNCTION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA TELEVISION COMPANY d/b/a/ WSB-TV, Plaintiff, v. TV NEWS CLIPS OF ATLANTA, INC., CAROLYN JANNETTE DUNCAN, and JEFFREY DUNCAN, Defendants.	)	CIVIL ACTION FILE NO. 1:88-CV-2207-JTC (Filed May 29, 1991)

ORDER OF COURT

This matter is currently before the Court on defendants' Motion for Summary Judgment, plaintiff's Motion for Summary Judgment, and defendants' Motion to Reconsider and Vacate Preliminary Injunction. For the reasons stated below, defendants' Motion for Summary Judgment is **DENIED**; plaintiff's Motion for Summary Judgment is **GRANTED**, and defendants' Motion to Reconsider and Vacate Preliminary Injunction is **DENIED**.

I. Background

In the instant case the material facts are not in dispute.[1] Defendants acknowledge the actions that have given rise to the instant infringement action. Instead, defendants assert several legal defenses purportedly justifying their actions. Both parties move for summary judgment on the basis of their legal arguments. Defendants have also moved this Court to reconsider its earlier grant of a preliminary injunction. The Court will address each party's motion in turn.

II. Defendants' Motion for Summary Judgment

In their motion for summary judgment, defendants first argue that plaintiff has misused its copyright precluding the plaintiff from recovering in the instant copyright action. Defendants' misuse of copyright argument is premised on the plaintiff's alleged bad faith in dealing with defendants prior to the instant action. Plaintiff issued repeated notices warning defendants to cease their infringing activity. Defendants argue that these notices indicate an intent to register copyrights for news broadcasts which plaintiff subsequently did not register. Defendants also argue that plaintiff's destruction of its video tapes thirty days after broadcast are a similar act of bad faith evidencing the supposed spuriousness of plaintiff's interest in its news broadcasts.

---

[1] This Court has previously issued findings of fact in this case. *See Georgia Television Co. v. TV News Clips of Atlanta, Inc.*, 718 F. Supp. 939, 942-45 (N.D. Ga. 1989). The facts remain, in pertinent part, as earlier stated by this Court.

Defendants rely on the case of *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990), which involved a software program developer's suit for copyright infringement. The developer entered licensing agreements with licensees which prevented the licensees from creating any of their own software which might compete with the developer's software. In light of the broad anticompetitive policy evinced by the developer's licenses, the Fourth Circuit held that the developer's policy amounted to misuse of copyright barring the developer's copyright infringement action. *Id.* at 979.

Even if the doctrine of *Lasercomb* is applicable in this Circuit,[2] the facts of the instant dispute indicate no copyright misuse on the part of plaintiff. No allegations of anticompetitive behavior have been made in the instant action. Plaintiff's other actions are wholly justified and indicate no bad faith. By issuing continued warnings to defendants regarding possible copyright infringement, plaintiff gave defendants ample opportunity to cease their infringing activity. Plaintiff's warnings indicate no bad faith. Plaintiff's decision to register or not register its broadcasts is its prerogative. Plaintiff's decision to destroy certain tapes after thirty days is similarly its prerogative.

---

[2] The Court in *Lasercomb* acknowledged that substantial uncertainty persists whether the doctrine of copyright misuse even exists. *Id.* at 973-74. The doctrine has not been definitively applied in this Circuit. *See Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 865 & n.27 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

Accordingly, this Court finds no evidence of copyright misuse and refuses to bar plaintiff's infringement action. Defendants' Motion for Summary Judgment on the grounds of misuse of copyright is **DENIED**.

Defendants also assert in their motion for summary judgment that defendant Jeffrey Duncan is not liable for the actions at issue. In this Circuit, an individual may be liable for infringing activity if the individual was personally involved in the infringing activity or the individual has the ability to supervise infringing activity and a financial interest in the activity whether aware of the activity or not. *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 811 (11th Cir. 1985). Jeffrey has already represented that he does not recall whether he participated in the infringing activity at issue. Jeffrey Duncan Dep. at 54. The parties vigorously dispute whether Jeffrey holds a supervisory position at TV News Clips or has a financial interest in TV News Clips. It is obvious that genuine issues of material fact exist with respect to Jeffrey's involvement in the infringing actions at issue. This Court correspondingly DENIES defendants' motion for summary judgment with respect to the issue of defendant Jeffrey Duncan's involvement.

III. Plaintiff's Motion for Summary Judgment

Plaintiff has moved for summary judgment on the grounds that defendants infringed plaintiff's copyright and that defendants have no viable defense for their actions. Plaintiff seeks permanent injunctive relief, statutory damages, and costs and attorneys fees. Defendants do not contest the existence of the copyright or the

infringing activity. Instead, defendants have raised numerous arguments in defense of their actions, many previously discussed in this or companion litigation.

A. The Merits of Defendants' Position

Many of the arguments raised by defendants were previously considered in litigation involving the same defendants and, except for the actual infringed material, identical facts. *See Pacific and Southern Co., Inc. d/b/a WXIA-TV v. Duncan d/b/a TV News Clips*, 744 F.2d 1490 (11th Cir. 1984) (*aff'g in part and rev'g in part*, 572 F. Supp. 1186 (N.D. Ga. 1983)), *cert. denied*, 471 U.S. 1004 (1985) ("*WXIA-I*"). This Court finds the holding of *WXIA I* controlling for purposes of this case and consequently will not discuss at length defendants' arguments firmly rejected in *WXIA I*.

Other arguments raised by defendants have been considered by this Court upon plaintiff's motion for a preliminary injunction. *See Georgia Television Co. v. TV News Clips of Atlanta, Inc.*, 718 F. Supp. 939, 945-48 (N.D. Ga. 1989). While it is true, as defendants contend, that the Court earlier examined these defenses only in the context of determining plaintiff's likelihood of success on the merits and defendants are entitled to raise the same defenses in opposition to summary judgment, defendants have presented no new facts, new legal analysis, or subsequent authority that would change this Court's initial evaluation of defendants' arguments. The Court will briefly address the arguments now raised by defendants.

Defendants argue that by recording and selling only portions of plaintiff's news broadcasts, defendants are not infringing plaintiff's copyright, since the underlying facts reported in the broadcasts are not subject to copyright. Defendants have repeatedly made this argument without comprehending the distinction between the facts reported in a broadcast and the broadcast itself. The plaintiff does not claim any copyright in the underlying facts of the news broadcasts and does not attempt to prevent defendants from reporting these facts as defendants wish. Rather, plaintiff rightfully challenges the defendants' business of copying and selling the particular news presentation of the plaintiff to persons and corporations that may be concerned with their public image projected by the news broadcast. Such activity directly implicates the creative work of plaintiff and is a direct infringement of plaintiff's copyright. *See Wainwright Securities, Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 95 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

Defendants again assert a defense based on the case of *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), which held that certain private, noncommercial copying of broadcasts would not constitute copyright infringement. This argument was fully addressed and rejected by this Court in granting a preliminary injunction. *See Georgia Television*, 718 F. Supp. at 948. Defendants reliance on *Sony* is misplaced given the "unabashedly commercial" nature of defendants' activities. *See WXIA I*, 744 F.2d at 1496. Accordingly, this Court will not again discuss the defendants' 'time-shifting' arguments.

Defendants also claim that their infringing activity is so limited in scope so as to be a de minimis infringement of plaintiff's copyright. Regardless of the fact that defendants may actually only sell a small portion of any one newscast, defendants have admitted that their recording activity is substantial and widespread. The infringing activity here at issue involves the recording of twenty-seven different portions of plaintiff's broadcasts providing a comprehensive compilation of plaintiff's coverage of the Democratic National Convention as it related to Atlanta. Defendants' activity cannot be considered quantitatively or qualitatively de minimis.

Defendants once again assert that their activity is protected under the fair use doctrine. The defendants' fair use argument was fully addressed and rejected in *WXIA I*. This Court finds the analysis of the Eleventh Circuit in *WXIA I* directly applicable to the facts of the instant case and the Court correspondingly will not repeat the Eleventh Circuit's opinion in response to defendants' arguments. *See WXIA I*, 744 F.2d at 1494-98.

Defendants do attempt to distinguish *WXIA I* by arguing that WSB-TV provides more limited public access to its copyrighted materials than the plaintiff WXIA-TV in *WXIA I*. Although, as defendants correctly assert, the Eleventh Circuit in *WXIA I* did express some concern over public access to news broadcasts, the Eleventh Circuit also found that "TV News Clips only increases access in a limited way by selling to a small group of customers" and that "TV News Clips' activities fall well beyond whatever protections might be available to further this public access interest." 744 F.2d at 1498. Assuming WSB-TV does in fact provide more limited public access to its

broadcast tapes than WXIA-TV, this Court finds that plaintiff's policies in this regard are not significantly different than the policies of WXIA-TV in *WXIA I*.

Defendants also argue that the doctrine of copyright estoppel applies to the instant case. The doctrine of copyright estoppel prevents a copyright owner from enforcing a copyright when the owner has falsely represented the nature of the work as factual rather than fictional. *See Houts v. Universal City Studios, Inc.*, 603 F. Supp. 26, 28 (C.D. Calif. 1984). Defendants assert that by notifying the defendants that plaintiff intended to register its copyrights, plaintiff made false representations since plaintiff failed to register all of the broadcasts accompanied by warnings. Defendants misapply the doctrine of copyright estoppel. Defendants do not assert that plaintiffs misrepresented the nature of their broadcasts. The doctrine has no application in a situation where plaintiff dutifully warns defendants of the copyrightable nature of a work and then subsequently registers the copyrights on which plaintiff elects to bring suit.

Defendants also claim that plaintiff is 'purely' estopped as a result of the alleged referral of clients to defendants by plaintiff's employees. Assuming that defendants' representations regarding referrals are true, this Court finds that these referrals by individual employees do not rise to the level of conduct inducing reliance on the part of defendants and thereby implicating the doctrine of 'pure' estoppel. It is undisputed that the corporate plaintiff WSB-TV did not endorse defendants' activities and that WSB-TV took affirmative steps to prevent any unauthorized referrals by plaintiff's employees. See Defendants' Memorandum in Opposition

to WSB-TV's Motion for Summary Judgment at 36. Plaintiff gave defendants clear notice through repeated warnings that defendants were in danger of a copyright infringement action. Defendants cannot now claim that they were somehow misled by isolated, unauthorized referrals made by plaintiff's employees.

Defendants finally argue that plaintiff is barred by the doctrine of laches since plaintiff unreasonably delayed the filing of the instant suit. Although WSB-TV had long suspected defendants were engaged in unlawfully copying plaintiff's news broadcasts, plaintiff was only able to obtain concrete proof of defendants' infringing activity in late July 1988. Accordingly, plaintiff then registered the pertinent copyrights and on September 30, 1988, filed its complaint in the instant action. Again, defendants attempt to use plaintiff's reasonable restraint in bringing suit as a defense to defendants' underlying activities. Plaintiff's restraint allowed defendants ample time to cease their infringing activity. In addition, plaintiff waited to obtain definite proof of defendants' activities before proceeding with the expensive process of litigation. These actions were appropriate and provide no defense for defendants. Defendants were continually warned by plaintiff of the threat of impending litigation, and defendants cannot now claim that defendants were somehow prejudiced by plaintiff's failure to file suit at an earlier time.

Defendants have failed to present any meritorious arguments in justification of their admitted actions. The Court hereby *GRANTS* plaintiff's motion for summary judgment with respect to defendants TV News Clips and

Carolyn Duncan. As noted above, genuine issues of material fact exist with regard to Jeffrey Duncan's involvement and consequent liability.

B. Remedies Requested by Plaintiff

Having granted plaintiff's motion for summary judgment, this Court must examine plaintiff's request for permanent injunctive relief, statutory damages, and costs and attorneys fees.

1. Permanent Injunction

Plaintiff requests permanent injunctive relief. In *WXIA I*, a nearly identical case involving the same defendants, when the District Court refused to grant permanent injunctive relief, the Eleventh Circuit Court of Appeals reversed and held that "this is a classic case, then, of a past infringement and a substantial likelihood of future infringements which would normally entitle the copyright holder to a permanent injunction against the infringer." *WXIA I*, 744 F.2d at 1499. The very fact that defendants are now engaging in the exact same conduct with a different plaintiff indicates the appropriateness of a permanent injunction in this case. This Court, in accordance with the holding of the Eleventh Circuit in *WXIA I*, finds the same analysis applicable in the instant case and grants the following permanent injunction:

TV News Clips, Carol Duncan, and all persons acting in concert with them, or either of them, are hereby permanently RESTRAINED and ENJOINED from copying or

selling copies of WSB-TV's broadcast news, public affairs and other locally produced programs, in whole or in part.

2. Damages

Plaintiff has requested maximum statutory damages in the instant case. Plaintiff has previously elected to recover statutory damages, as opposed to actual damages, pursuant to 17 U.S.C. § 504(c). This section provides, in pertinent part:

> (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action . . . in a sum not less than $250 or more than $10,000 as the court considers just. . . .
>
> (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $50,000.

Plaintiff asserts that defendants' infringement has been willful and, consequently, plaintiff requests the maximum statutory damages of $50,000 for each of the twenty-seven infringements in the instant case.

This Court finds that, as a result of the *WXIA I* litigation, defendants clearly were aware of the unlawfulness of their activities. Defendants admit that despite the outcome of *WXIA I* and despite the entry of a preliminary

injunction in this case, defendants have continued to tape and sell copies of other stations' news broadcasts. In blatant disregard of the import of the previous litigation against defendants, defendants admit that "until she [Duncan] is able to reach a mutually satisfactory arrangement with these broadcasters, or until she is no [sic] ordered by a court of law, she will continue her monitoring activities." Defendants' Response to "Plaintiff's Statement of Material Facts to Which There is No Genuine Issue to be Tried" at 12.

These responses indicate that defendants will continue to violate the law, requiring numerous copyright owners to bring successive actions in this and other courts, creating unnecessary litigation, and hoping that by sheer obstinance defendants will be able to outlast prospective plaintiffs. This Court correspondingly finds that defendants have acted willfully in infringing upon plaintiff's copyright and, pursuant to 17 U.S.C. § 504(c)(2), this Court **GRANTS** plaintiff statutory damages in the amount of $4,000 for each of the twenty-seven infringements admitted by the defendants in this action.

3. Costs and Attorneys Fees

In addition to the statutory damages awarded in this action, this Court finds that implicit in defendants' actions is a course of conduct purposely infringing plaintiff's copyright and imposing the substantial litigation costs of pursuing an infringement action on plaintiff while defendants profit in the meantime from their infringing activity. In such a situation an award of costs and attorneys fees to the prevailing party is particularly

appropriate. *See Blackman v. Hustler Magazine, Inc.*, 620 F. Supp. 792, 802-03 (D.D.C. 1985), *aff'd in relevant part*, 800 F.2d 1160 (D.C. Cir. 1986). Pursuant to 17 U.S.C. § 505, this Court hereby **GRANTS** plaintiff's request for costs and attorneys fees in an amount to be hereafter determined by the Court.

IV. Defendants' Motion for Reconsideration

Defendants have moved to reconsider this Court's grant of a preliminary injunction in light of the recent Supreme Court case of *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, ___ U.S. ___, 59 U.S.L.W. 4251 (March 27, 1991).[3] The United States Supreme Court in *Feist* held that the alphabetical listing of names in the white pages of a phone book was not sufficiently original to allow the creator of the listing to maintain a copyright infringement action against a company that used the phone listing in their own phone book without the creator's consent. As plaintiff in the instant case correctly points out, the facts of *Feist* are dramatically distinguishable from the facts in the instant case. As this Court has already noted, news broadcasts possess the requisite originality to justify a copyright. *See Georgia Television*, 718 F. Supp. at 946; *See also WXIA I*, 744 F.2d at 1494; *KCNC-TV, Inc. v. Broadcast Information Services, Inc.*, 717 F. Supp. 1449 (D. Colo. 1988). The Supreme Court's holding in *Feist*

---

[3] In light of this Court's grant of a permanent injunction in this Order, defendants' motion with respect to the preliminary injunction is now technically moot. However, this Court will address the merits of defendants' motion as applied to the permanent injunction issued pursuant to this Order.

does not purport to change this analysis. This Court hereby **DENIES** defendants' motion for reconsideration of its earlier grant of a preliminary injunction or the Court's instant grant of a permanent injunction in this Order.

V. Conclusion

For the reasons stated above, defendants' Motion for Summary Judgment is **DENIED**; plaintiff's Motion for Summary Judgment is **GRANTED**, and defendants' Motion to Reconsider and Vacate Preliminary Injunction is **DENIED**.

SO ORDERED, this 24 day of May, 1991.

/s/ Jack Camp
JACK T. CAMP
UNITED STATES
DISTRICT JUDGE

APPENDIX D

FINAL JUDGMENT OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA TELEVISION COMPANY
d/b/a WSB-TV

v.

TV NEWS CLIPS OF ATLANTA, INC.,
CAROLYN JANNETTE DUNCAN and
JEFFREY DUNCAN

CIVIL ACTION

1:88-cv-2207-JTC

JUDGMENT

This action having come before the court, Honorable Jack T. Camp, United States District Judge, for consideration of plaintiff's motion for summary judgment, and the court by order entered May 29, 1991, having granted plaintiff's motion as to plaintiff's copyright infringement claims against defendants; and this action having further come before the court for consideration of plaintiff's motion for entry of judgment pursuant to Fed. R. Civ. P. 54(b), and the court having granted plaintiff's motion, it is

Ordered and Adjudged that the plaintiff recover of the defendants TV NEW CLIPS OF ATLANTA, INC. and CAROLYN JANNETTE DUNCAN the amount of $108,000.00, together with interest thereon at the rate of 5.68% per annum from date of judgment until paid.

It is Further Ordered and Adjudged that the defendants are permanently **ENJOINED AND RESTRAINED** as set forth in the order of May 29, 1991.

Dated at Atlanta, Georgia, this 23rd of September, 1991.

LUTHER D. THOMAS, CLERK

By: /s/ K. J. Melin
Kendel J. Melin
Deputy Clerk

APPENDIX E

DENIAL OF PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 91-8589 & 92-8331

GEORGIA TELEVISION COMPANY,
dba
WSB-TV,

Plaintiff-Appellee,

versus

TV NEWS CLIPS OF ATLANTA, INC.,
CAROLYN JANNETTE DUNCAN,

Defendants-Appellants.

JEFFREY DUNCAN,

Defendant.

On Appeal from the United States District Court
for the Northern District of Georgia

Filed November 3, 1993)

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S)
OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, CARNES, Circuit Judge, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

(X) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
CHIEF JUDGE

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Article I, Section 8, clause 8:

The Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

U.S. Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

17 U.S.C. §102 Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying mucic [sic];

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings;

(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. §103 Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 U.S.C. §105 Subject matter of copyright: United States Government works

Copyright protection under this title is not available for any work of the United States Government, but the

United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

17 U.S.C. §107 Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. §201. Ownership of Copyright

* * *

(b) Works Made for Hire. In the case of works made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly asgreed [sic] otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

* * *

17 U.S.C. §301 Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes or any State with respect to

> (1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or
>
> * * *

17 U.S.C. §302(c) Anonymous Works, Pseudonymous Works, and Works made for Hire

(c) In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first. If, before the end of such term, the identify of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that

work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

17 U.S.C. §502 Remedies for infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28 ["Judiciary and Judicial Procedure"], grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(2)

Supreme Court, U.S.
F I L E D
FEB 2 1994
OFFICE OF THE CLERK

No. 93-1067

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TV NEWS CLIPS OF ATLANTA, INC., CAROLYN JANNETTE DUNCAN AND JEFFREY DUNCAN,

Petitioners,

vs.

GEORGIA TELEVISION COMPANY D/B/A WSB-TV

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

Peter C. Canfield
(Counsel Of Record)
Dow, Lohnes & Albertson
One Ravinia Drive
Suite 1600
Atlanta, GA 30346
(404) 901-8800

Arnold P. Lutzker
Diane M. Morse
Dow, Lohnes & Albertson
1255 23rd St., N.W.
Washington, D.C. 20037
(202) 857-2500

Counsel for Respondent Georgia Television Company d/b/a WSB-TV

12-19

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the district court abused its discretion in entering an injunction against Defendants, identical to the injunction previously entered against the same Defendants in the WXIA case, which prohibits Defendants' systematic, unauthorized copying and sale of WSB-TV's copyrighted programming?

TABLE OF CONTENTS

PAGE

COUNTERSTATEMENT OF QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

I. STATUTORY PROVISIONS INVOLVED .. 2

II. COUNTERSTATEMENT OF THE CASE .. 2

A. The WXIA Case 3

B. The Instant Litigation 5

III. SUMMARY OF THE ARGUMENT 12

IV. REASONS WHY THE WRIT SHOULD BE DENIED 15

A. The District Court's Holding That Defendants' Systematic, Unauthorized Copying and Sale of WSB-TV's Copyrighted Programming Constitutes Copyright Infringement is Consistent With Basic Copyright Principles and Case Law 15

1. WSB-TV's News and Public Affairs Programs are Protected by Copyright 16

PAGE

2. The District Court's Rejection of Defendants' Alleged Defenses and Its Finding of Infringement Are Consistent With Case Law 21

B. The Injunction Entered by the District Court Is Lawful and Plainly Appropriate to the Violation 25

V. CONCLUSION 33

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Association of American Medical Colleges v. Carey, 482 F. Supp. 1358 (N.D.N.Y. 1980) 26

Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) 28

Chicago Record-Herald Co. v. Tribune Ass'n., 275 F. 797 (7th Cir. 1921) 17

Encyclopedia Britannica Ed. Corp. v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1982) 26, 29

Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F.2d 667 (5th Cir. 1975) cert. denied, 423 U.S. 841 (1975) 29

Feist Publications, Inc. v. Rural Telephone Service Co., 111 S.Ct. 1282 (1991) 19, 20, 21

Georgia Television Company d/b/a WSB-TV v. TV News Clips of Atlanta, 19 U.S.P.Q.2d 1372 (N.D. Ga. 1991) ..... passim

PAGE

Georgia Television Company d/b/a WSB-TV v. TV News Clips of Atlanta, 718 F. Supp. 939 (N.D. Ga. 1989) 8, 17

Gore v. Turner, 563 F.2d 159 (5th Cir. 1977) 32

Harper & Row Publishers, Inc. v Nation Enterprises, 471 U.S. 539 (1985) ..... passim

International News Service v. Associated Press, 248 U.S. 215 (1918) 17, 18, 21

Iowa State University Research Found., Inc. v. American Broadcasting Companies, 621 F.2d 57 (2d Cir. 1980) 17, 18, 22-23

KCNC-TV Inc. v. Broadcast Information Services, Inc., 717 F. Supp. 1449 (D.Colo. 1988) 17

Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981) 17, 18

National Football League v. McBee & Bruno's, Inc., 792 F.2d 726 (8th Cir. 1986) 26, 28

Ortho-O-Vision, Inc. v. Home Box Office, 474 F. Supp. 672 (S.D.N.Y. 1979) 26, 29

PAGE

Pacific and Southern Company v. Duncan,
572 F. Supp. 1186 (N.D.Ga. 1983),
aff'd in part and rev'd in part,
744 F.2d 1490 (11th Cir. 1984),
cert. denied, 471 U.S. 1004 (1985),
on remand, 618 F. Supp. 469 (N.D.Ga. 1985),
aff'd, 792 F.2d 1013 . . . . . passim

Paramount Pictures Corp. v. Labus,
16 U.S.P.Q.2d 1142
(W.D. Wis. 1990) 29

Sailor Music v. Gap Stores, Inc., 668 F.2d 84
(2d Cir. 1981), cert. denied,
456 U.S. 945 (1982) 28

Southwestern Bell Tel. Co. v. Nationwide Ind. Dir.
Serv., Inc., 371 F. Supp. 900
(W.D. Ark. 1974) 29

Wainwright Securities, Inc. v. Wall Street
Transcript Corp., 558 F.2d 91
(2d Cir. 1977), cert. denied,
434 U.S. 1014 (1978) 17, 18

Walt Disney Co. v. Powell, 897 F.2d 565
(D.C. Cir. 1990) 26, 28

PAGE

FEDERAL STATUTES

17 U.S.C. § 102(a) (1988) 16

17 U.S.C. §411(b) (1988) 5, 29-30

17 U.S.C. § 502(a) (1988) 25

MISCELLANEOUS

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 52 (1976) 20

No. 93-___

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TV NEWS CLIPS OF ATLANTA, INC., CAROLYN JANNETTE DUNCAN AND JEFFREY DUNCAN,

Petitioners,

vs.

GEORGIA TELEVISION COMPANY D/B/A WSB-TV

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

Respondent Georgia Television Company d/b/a WSB-TV ("WSB-TV")[1/] hereby files this brief in

---

1/ Pursuant to Rule 29.1, Sup. Ct. Rules, the following information is provided: Georgia Television Company d/b/a WSB-TV is a wholly-owned subsidiary of Cox Enterprises, Inc.

opposition to a Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above entitled case on January 8, 1993.

I.

STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Copyright Act of 1976, including: 17 U.S.C. §§ 102, 106, 107, 410, 411, 412, 501, 502 and 505.

II.

COUNTERSTATEMENT OF THE CASE

This is the second time that Defendants have petitioned this Court for review of a judgment against them based on their unauthorized copying and sale of copyrighted broadcast programming. In 1985, this Court denied Defendants' petition for certiorari in Pacific and Southern Company v. Duncan, 572 F.

Supp. 1186 (N.D.Ga. 1983), aff'd in part and rev'd in part, 744 F.2d 1490 (11th Cir. 1984), cert. denied, 471 U.S. 1004 (1985) ("WXIA I"), on remand, 618 F. Supp. 469 (N.D.Ga. 1985), aff'd, 792 F.2d 1013 ("WXIA II") (sometimes collectively referred to as "WXIA"), a case nearly identical to this one in which the district court entered, and the Court of Appeals for the Eleventh Circuit affirmed, a permanent injunction against these same Defendants for repeated copyright violations. The injunction entered by the district court and affirmed by the Eleventh Circuit in the instant case is identical to the injunction in WXIA.

A. The WXIA Case

In WXIA, the district court held that Defendants' copying and sale of a portion of a WXIA news broadcast infringed WXIA's copyright and that such

activity was neither "fair use" nor protected by the First Amendment. WXIA I, 572 F. Supp. 1186. The district court nevertheless refused to enjoin Defendants' activities, concluding that such an injunction would infringe Defendants' First Amendment rights. Id.

The Court of Appeals for the Eleventh Circuit affirmed the district court's entry of judgment for WXIA, but reversed as an abuse of discretion the district court's refusal to enter an injunction. WXIA I, 744 F.2d 1490. The Court of Appeals reasoned that "[t]his is a classic case . . . of a past infringement and a substantial likelihood of future infringements which would normally entitle the copyright holder to a permanent injunction against the infringer." Id. at 1499.

The Court of Appeals remanded the case to the district court with instructions to enter a permanent injunction. On remand, and after this Court's denial of Defendants' petition for writ of certiorari, the district court entered a permanent injunction against Defendants, which was affirmed by the Eleventh Circuit. WXIA II, 792 F.2d 1013.

B. The Instant Litigation

On December 11, 1986, following the Eleventh Circuit's affirmance of the permanent injunction in WXIA and after hearing rumors that despite the WXIA rulings Defendants were copying and selling copies of WSB-TV's broadcasts, WSB-TV began serving on Defendants, pursuant to 17 U.S.C. § 411(b), advance notices of potential infringement. The notices reiterated to Defendants that any copying or sale of copies of WSB-TV's broadcast news

programs would constitute unlawful copyright infringement and demanded that Defendants cease and desist all such activity. Despite the teaching of the WXIA decisions and despite WSB-TV's periodic service on Defendants of such advance notices of potential infringement, Defendants continued to copy and sell copies of WSB-TV's broadcast news programs and portions thereof.

Despite having received an advance notice of infringement from WSB-TV on June 29, 1988, Defendants copied and sold to the city of Atlanta copies of portions of 27 different WSB-TV broadcast programs. The portions of these programs copied and sold by Defendants consisted for the most part of Atlanta-related aspects of the Democratic National Convention and ranged from reports on construction disputes and demonstrations and events within the

Convention hall itself to interviews with newsmakers, political commentary and an hour-long special, made possible only through the use of complex and expensive multiple satellite feeds, of various Convention parties throughout the metropolitan Atlanta area. Defendants copied and sold this entire hour-long WSB-TV special on Convention-related parties, entitled "You're Invited."

WSB-TV registered the copyrights in the twenty seven programs copied by Defendants, and filed its Complaint, together with a motion for preliminary injunction, on September 30, 1988. By their October 28, 1988 Answer, Defendants admitted that they copied and sold to the City of Atlanta copies of the 27 different WSB-TV broadcast news programs identified in WSB-TV's Complaint. At an evidentiary hearing, Defendants admitted further that they copied

for commercial sale every news and public affairs program of WSB-TV whether or not a buyer was available at the time of copying.

Defendant Duncan testified that Defendants' activities in this case differed from their activities at the time of WXIA only in that, as a result of the growth of their business, they did not have the time to engage in as much solicitation of new customers. She also testified that Defendants would not stop copying and selling copies of WSB-TV's broadcasts absent a court order.

On January 9, 1989, the district court made findings of fact and conclusions of law and granted WSB-TV's motion for preliminary injunction. Georgia Television Company d/b/a WSB-TV v. TV News Clips of Atlanta, 718 F. Supp. 939 (N.D.Ga. 1989) ("WSB-TV I"). The preliminary injunction

entered was identical to that entered by the district court and affirmed by the Eleventh Circuit in WXIA.

Following discovery, Defendants and WSB-TV filed cross-motions for summary judgment. On May 29, 1991, the district court denied Defendants' motion for summary judgment and granted WSB-TV's motion for summary judgment as to Defendants TV News Clips and Carolyn Duncan. Georgia Television Company d/b/a WSB-TV v. TV News Clips of Atlanta, 19 U.S.P.Q.2d 1372 (N.D.Ga. 1991) ("WSB-TV II"). By the order, the district court held that WSB-TV was entitled to a permanent injunction. The district court reasoned:

> In WXIA I, a nearly identical case involving the same defendants, when the District Court refused to grant permanent injunctive relief, the Eleventh Circuit Court of Appeals reversed and held that 'this is a classic case, then, of a past infringement and a substantial likelihood of future infringements which

> would normally entitle the copyright holder to a permanent injunction against the infringer.' WXIA I, 744 F.2d at 1499. The very fact that defendants are now engaging in the exact same conduct with a different plaintiff indicates the appropriateness of a permanent injunction in this case.

WSB-TV II, 19 U.S.P.Q.2d at 1376.

The injunction granted by the district court in this case is identical in form to that reviewed and affirmed by the Eleventh Circuit in WXIA.

By the order, the court also held that WSB-TV was entitled to recover from TV News Clips and Carolyn Duncan statutory damages in the amount of $4,000 for each of the 27 infringements, as well as costs and attorneys fees. The court stated:

> This Court finds that, as a result of the WXIA I litigation, defendants clearly were aware of the unlawfulness of their activities. Defendants admit that despite the outcome of WXIA I and despite the entry of a preliminary injunction in this case, defendants have continued to tape and sell copies of

> other stations' news broadcasts. In blatant disregard of the import of the previous litigation against defendants, defendants admit that 'until she [Duncan] is able to reach a mutually satisfactory arrangement with these broadcasters, or until she is no [sic] ordered by a court of law, she will continue her monitoring activities.'
>
> These responses indicate that defendants will continue to violate the law, requiring numerous copyright owners to bring successive actions in this and other courts, creating unnecessary litigation, and hoping that by sheer obstinance defendants will be able to outlast prospective plaintiffs.

WSB-TV II, 19 U.S.P.Q.2d at 1376-77.

On January 8, 1993, the Eleventh Circuit affirmed the judgment of the district court in a per curiam opinion. Defendants filed a petition for rehearing, which was denied on November 3, 1993.

III.

SUMMARY OF THE ARGUMENT

Defendants' claim that this case raises new, important issues requiring review by this Court is wrong. Although Defendants neglect to mention it, this is the second case in which judgment has been entered against them for repeated copyright violations.

This Court previously denied Defendants' petition for writ of certiorari in WXIA, a case nearly identical to this one and in which the identical injunction was entered against Defendants. The instant case is based on the same well settled body of case law as WXIA. This case raises no new issues, and it is not in conflict with the decisions of this Court, or any other court. Review by this Court is not warranted.

Both this case and WXIA involve straightforward applications of copyright principles to activities of the Defendants that are unquestionably infringing. The decisions are based on a substantial body of case law holding that news reports, including broadcast news reports, are protected by copyright. The finding in both cases that Defendants' "unabashedly commercial" activities do not constitute fair use is entirely consistent with the purpose of Section 107 of the Copyright Act and a substantial body of case law.

The injunctive relief entered against Defendants in this case was plainly appropriate. Defendant Duncan's own testimony establishes that, absent a court order, there is a certainty of future infringements in this case.

Defendants' claim that the injunction is overbroad because it prevents them from copying and

selling public domain material, government works and copyrighted material of others contained in WSB-TV's newscasts has no basis in reality. As the court found in WXIA, Defendants built their business based not on such material, but on material clearly protected by the station's copyright.

Defendants' claim that this case has sweeping copyright and fair access implications and establishes a "federal common law copyright" is nonsense. This case turns on its own facts and will affect few others besides Defendants. The record in this case establishes that, despite a previous judgment against them in WXIA, Defendants engaged in wholesale pirating of WSB-TV's copyrighted works for their own commercial gain. This cannot be fair use, and constitutes blatant copyright infringement.

Both the WXIA and WSB decisions are good law and have been relied on and cited authoritatively by a number of courts, including this Court in Harper & Row Publishers, Inc. v Nation Enterprises, 471 U.S. 539 (1985) ("Nation"). This Court should not accept Defendants' disingenuous characterization of this case as one that raises "new" and important issues requiring review by the Court. Defendants' petition for writ of certiorari should be denied.

IV.

REASONS WHY THE WRIT SHOULD BE DENIED

A. The District Court's Holding That Defendants' Systematic, Unauthorized Copying and Sale of WSB-TV's Copyrighted Programming Constitutes Copyright Infringement is Consistent With Basic Copyright Principles and Case Law

This case involves a straightforward application of basic copyright principles. The district court's

holding that WSB-TV's broadcast news and public affairs programs are protected by copyright, and that Defendants infringed WSB-TV's copyrights when it copied and sold twenty seven of WSB-TV's programs, is entirely consistent with basic copyright principles and a substantial body of case law.

1. WSB-TV's News and Public Affairs Programs are Protected by Copyright

Section 102(a) of the Copyright Act provides that copyright protection subsists "in original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (1988). It is undisputed that WSB-TV's programs are fixed in a tangible medium when they are recorded at the time of broadcast.

Moreover, the district court correctly held that WSB-TV's programs are sufficiently original for

copyright. There is a substantial body of case law holding that news reports, including broadcast news reports, meet the threshold level of originality for copyright protection.[2/] Indeed, there is no authority to the contrary.[3/]

2/ See, e.g., Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985); International News Service v. Associated Press, 248 U.S. 215 (1918); KCNC-TV Inc. v. Broadcast Information Services, Inc., 717 F. Supp. 1449 (D.Colo. 1988); WXIA I, 744 F.2d at 1494; Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981); Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, 621 F.2d 57 (2d Cir. 1980); Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978); Chicago Record-Herald Co. v. Tribune Ass'n., 275 F. 797 (7th Cir. 1921).

3/ In granting WSB-TV's motion for preliminary injunction, the district court made a specific factual finding that "WSB-TV has shown that its broadcasts represent a creative product and involve editorial discretion." WSB-TV I, 718 F. Supp. at 946. The district court made the same

(continued...)

The district court in WXIA I succinctly stated the operative legal principles:

> It is axiomatic that copyright protection does not extend to news 'events' or the facts or ideas which are the subject of the news reports. Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1368 (5th Cir. 1981)' Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 95 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978). But it is equally well-settled that copyright protection does extend to the reports themselves, as distinguished from the substance of the information contained in the reports. Wainwright, 558 F.2d at 95; International News Service v. Associated Press, 248 U.S. 215 (1918); see Chicago Record-Herald Co. v. Tribune Ass'n., 275 F. 797 (7th Cir. 1921); 1 Nimmer on Copyright § 2.11[B] (1983). Copyright protects the manner of expression of the news reports, "'the particular form or collocation of words in which the writer has communicated it.'" International News Service, 248 U.S. at 234.

3/ (...continued)
finding as to WXIA's programs in WXIA I. 744 F.2d at 1494 ("[t]he editorial judgment used to present effectively the events covered by the broadcast made it an 'original' work of authorship").

> Such protection extends to electronic news reports as well as written reports. See 17 U.S.C. § 102(a)(5), (6), and (7); see also Iowa State University Research Foundations, Inc. v. American Broadcasting Cos., 621 F.2d 57, 61 (2d Cir. 1980).

WXIA I, 572 F. Supp. at 1191-92.

Contrary to Defendants' claim, this Court's decision in Feist Publications, Inc. v. Rural Telephone Service Co., 111 S.Ct. 1282 (1991) ("Feist"), has no effect on the district court's holding in this case. As the district court stated below, the facts of Feist are "dramatically distinguishable" from this case. WSB-TV II, 19 U.S.P.Q.2d at 1377.

In Feist, this Court held that an alphabetical, "garden variety" listing of names, addresses and phone numbers did not possess the modicum of originality required for copyright. Feist, 111 S.Ct. at 1296-1297. Alphabetical white pages listings, however, are far

afield from news and public affairs programs, which involve editorial discretion, and combine such elements as video, audio, set design, music, camera angles, shot selection, narratives, lighting and graphics.[4/]

The fact is that the district court's holding in this case, and the court's holding in WXIA, are entirely

---

4/ That such elements constitute original authorship for copyright purposes is expressly supported by the legislative history of the Copyright Act of 1976. The House Report noted that:

> When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is no doubt that what the cameramen and the director are doing constitutes 'authorship.'

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 52 (1976).

consistent with Feist.[5/] Copyright does not protect facts; it does, however, protect expression of facts. Indeed, not a single court has given Feist the radical interpretation advanced by Defendants.

2. The District Court's Rejection of Defendants' Alleged Defenses and Its Finding of Infringement Are Consistent With Case Law

Defendants' claim that their activities are both protected by the First Amendment and a fair use because they provide public access to news broadcasts is without merit, and the district court properly

---

5/ That WSB-TV's news and public affairs programs are protected by copyright is also consistent with this Court's holding in Nation that, while "news of the day" is not protected by copyright, "factual narratives" clearly are. 471 U.S. at 556-57. Indeed, Defendants' theory would require reversal of two seminal copyright cases, Nation and International News Service v. Associated Press, 248 U.S. 215 (1918).

rejected it.[6/] This Court rejected the very same argument made by the defendant in Nation, concluding that "Any copyright infringer may claim to benefit the public by increasing access to the copyrighted work."[7/] 471 U.S. at 569.

In Nation, this Court recognized that the public interest in the free flow of information is protected by

---

6/ Contrary to Defendants' claims, the record in this case establishes that WSB-TV provides public access to its news and public affairs programs. WSB-TV preserves for at least 30 days a broadcast-quality videotape copy of all of its broadcasts and, for certain selected broadcasts, retains such copies indefinitely. In addition, WSB-TV preserves for several years a non-broadcast quality audio and/or visual copy of all of its broadcasts. WSB-TV has always honored requests by the public to view tapes at the station. Defendants, on the other hand, destroy their tapes of programs within a month of the broadcast. WXIA I, 572 F. Supp. at 1196.

7/ This Court cited as authority for rejecting the defendant's argument the Eleventh Circuit's holding in WXIA I. Id. (citing 744 F.2d 1499-1500).

the copyright law's refusal to protect facts, as opposed to the expression of facts. The Court quoted the following passage from Iowa State University Research Found., Inc. v. American Broadcasting Cos., 621 F.2d 57 (2d Cir. 1980), a case involving ABC's use of a portion of a documentary film:

> ABC possessed an unfettered right to use the factual information revealed in Champion for the purpose of enlightening its audience, but it can claim no need to 'bodily appropriate' Iowa's expression of that information by utilizing portions of the actual film. The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts. The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.

621 F.2d at 61 (citations omitted).

Moreover, the court in this case and in WXIA made specific findings that the Defendants activities

did little, if anything, to increase access to the stations' broadcasts. As the court stated in WXIA I:

> [Defendants'] sale of newscast copies does not substantially further public dissemination or perpetuation of news accounts. Since [Defendants] destroy[] [their] tapes within a month of the broadcast, the only archival purpose served by [their] activity is that attendant to getting news clips into private hands (actually, mostly into corporate file folders).

572 F. Supp. at 1196.

Defendants admitted copying and selling copies of the twenty seven registered programs at issue in this case. The district court's holding that Defendants' activities are neither protected by the First Amendment nor a fair use is entirely consistent with the decisions of this Court and other courts. Therefore, the district court correctly held that Defendants infringed the copyright in WSB-TV's programs.

B. The Injunction Entered by the District Court Is Lawful and Plainly Appropriate to the Violation

The injunction entered against Defendants in this case, identical to that previously entered against Defendants in WXIA, is plainly appropriate. The injunction is consistent with § 502 of the Copyright Act,[8/] which empowers courts to enjoin infringement of a copyright. It is also consistent with a substantial

---

8/ Section 502(a) of the Copyright Act provides:

> Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

17 U.S.C. § 502(a) (1988).

body of case law involving a past infringement and a likelihood of future infringement.[9/]

Defendants admitted that, with the intent to commercially exploit, they copied every news and public affairs program of WSB-TV. They also admitted copying and selling copies of the twenty seven works at issue in this case, despite receipt of WSB-TV's repeated advance notices of infringements. Defendant Carolyn Duncan testified that Defendants would not stop copying and selling copies of WSB-TV's broadcasts absent a court order. Therefore, the

---

9/ See, e.g., Walt Disney Co. v. Powell, 897 F.2d 565 (D.C. Cir. 1990); National Football League v. McBee & Bruno's, Inc., 792 F.2d 726 (8th Cir. 1986); WXIA I, 744 F.2d at 1499 n.17; Encyclopedia Britannica Ed. Corp. v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1982); Association of American Medical Colleges v. Carey, 482 F. Supp. 1358 (N.D.N.Y. 1980); Ortho-O-Vision, Inc. v. Home Box Office, 474 F. Supp. 672 (S.D.N.Y. 1979).

district court properly held that "[t]his is a classic case . . . of a past infringement . . . which would normally entitle the copyright holder to a permanent injunction against the infringer." WSB-TV II, 19 U.S.P.Q.2d at 1376.

Section 502(a) of the Copyright Act grants courts broad equitable powers to prevent copyright infringements. As the court stated in WXIA I:

> The district court in this case had the power to issue an injunction because the statute provides for injunctions to prevent infringement of 'a copyright,' not necessarily the registered copyright that gave rise to the infringement action. The opposite result would be especially unjust in a case such as this one in which the registered work and the future works are so closely related, part of a series of original works created with predictable regularity and similar format and function. To refuse injunctive relief under these conditions would render meaningless the fact that registration is 'not a condition of copyright protection.'

744 F.2d at 1499, n.17.

Defendants' claim that the injunction is unlawful because it protects works not in suit and works not yet created is without merit. Courts have consistently held that injunctive relief is available for works of the plaintiff not in suit and future works where a pattern of infringement and a likelihood of future infringement is established.[10/] Here, Defendant

---

10/ See, e.g., Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1542 (S.D.N.Y. 1991) (injunction covering "works not currently existing but which may in the future be owned by plaintiffs"); Walt Disney Co. v. Powell, 897 F.2d 565 (D.C. Cir. 1990) (injunction may be extended to works not in suit where likelihood of future infringement established); National Football League v. McBee & Bruno's, Inc., 792 F.2d 726 (8th Cir. 1986) (permanent injunction for works not yet in existence); WXIA I, 744 F.2d at 1499 n.17 (permanently enjoining copying or sale of existing and future broadcast news and public affairs programs); Sailor Music v. Gap Stores, Inc., 668 F.2d 84 (2d Cir. 1981) (permanently enjoining defendant from playing radio broadcasts in clothing store that would infringe copyrighted musical compositions), cert. denied, 456 U.S. 945

(continued...)

Duncan's own testimony establishes that there is a certainty of future infringements.[11/]

10/ (...continued)
(1982); Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F.2d 667 (5th Cir. 1975) (permanently enjoining defendant from copying and selling copies of copyright owner's hit musical compositions), cert. denied, 423 U.S. 841 (1975); Paramount Pictures Corp. v. Labus, 16 U.S.P.Q.2d 1142 (W.D. Wis. 1990) (permanently enjoining future infringement of works presently owned or owned in the future by plaintiffs); Encyclopedia Britannica Ed. Corp. v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1982) (permanently enjoining infringement of future works); Ortho-O-Vision, Inc. v. Home Box Office, 474 F. Supp. 672 (S.D.N.Y. 1979) (injunction covering future works); Southwestern Bell Tel. Co. v. Nationwide Ind. Dir. Serv., Inc., 371 F. Supp. 900 (W.D. Ark. 1974) (permanently enjoining infringement of existing works or works to be published in the future).

11/ Moreover, the programs at issue in this case were registered pursuant to § 411(b) of the Copyright Act. Section 411(b) provides that the copyright owner may, either before or after fixation of the work takes place, institute an action for infringement, fully subject to the remedies in §§ 502 through 506 of the Act. Therefore,
(continued...)

Defendants' theory that injunction cannot protect future works would emasculate the remedy of injunction in copyright infringement cases. If, as Defendants claim, no court could enjoin today an infringement that is certain to occur tomorrow, WSB-TV and other stations would be forced to file suit daily to prevent infringement of their copyrighted news and public affairs programs. As the district court found, the record in this case established that, absent an injunction, "defendants will continue to violate the law, requiring numerous copyright owners to bring successive actions in this and other courts, creating unnecessary litigation, and hoping that by

---

11/ (...continued)
Congress created a statutory scheme in § 411(b) that specifically allows a copyright owner such as WSB-TV to obtain injunctive relief prior to the creation of the work.

sheer obstinance defendants will be able to outlast prospective plaintiffs." WSB-TV II, 19 U.S.P.Q.2d at 1377.

Defendants' claim that the injunction is overbroad because it prevents them from copying and selling public domain material, government works, material abandoned by WSB-TV and copyrighted material of others contained in WSB-TV's newscasts has no basis in reality. As the court found in WXIA II, Defendants' built their business based not on such material, but on material clearly protected by the station's copyright:

> [W]e do not read the injunction against copying or selling 'WXIA-TV's broadcast news programs' to preclude [Defendants] from taping any uncopyrightable work aired on the WXIA broadcasts -- although it is difficult to imagine how [Defendants] could profit from this narrow class of material. Indeed, we have seen no indication that the appellant does wish to tape these segments.

> We will not require the district court to list every minute or hypothetical exception to its injunctive order when the thrust of that order is clear. [Defendants'] professed concern that the injunction prohibits her from taping material abandoned by WXIA is similarly hypothetical. The record reflects that such material is minimal; indeed, [Defendants] could at best make only soundless video recordings of segments in which news anchors speak in the studio (since audio tapes and transcripts of the entire broadcast, and videotapes of non-studio reports are preserved by the station).

792 F.2d at 1014 (footnote omitted).

Framing an injunction appropriate to the facts of a particular case is a matter peculiarly within the discretion of the district court judge. Gore v. Turner, 563 F.2d 159, 165 (5th Cir. 1977). As in WXIA, Defendants admitted and the district court found that Defendants had regularly copied and sold WSB-TV's copyrighted newscasts and would continue to do so. Unless WSB-TV could obtain an injunction, WSB-TV

could enforce its copyrights in its programs only by finding out which stories have been copied, registering those stories, and bringing many different infringement actions. Accordingly, the district court properly held that WSB-TV is entitled to a permanent injunction.

V.

CONCLUSION

This case involves a straightforward application of basic copyright principles to activities of the Defendants that are unquestionably infringing. Contrary to Defendants' claims, this case does not raise new or important issues requiring review by this Court, and the decision is not in conflict with the decisions of this Court, or any other court. The injunction entered against Defendants in this case, which is identical to that previously entered against

these very same Defendants in WXIA, is plainly appropriate.

Respondent respectfully requests that this Court deny the Defendants' petition for writ of certiorari.

Respectfully submitted,
Peter C. Canfield
(Counsel Of Record)
Dow, Lohnes & Albertson
One Ravinia Drive
Suite 1600
Atlanta, Georgia 30346
(404) 901-8800

Arnold P. Lutzker
Diane M. Morse
Dow, Lohnes & Albertson
1255 23rd St., N.W.
Washington, D.C. 20037
(202) 857-2500

Counsel for Respondent Georgia Television Company d/b/a WSB-TV

Date: February 2, 1994